INDEX.

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Opinion Below	2
Jurisdiction	3
Federal Constitutional Provision Involved	3
Summary and Short Statement of the Matter Involved	3
Question Presented	18
Reasons Relied On for Allowance of Writ of Certiorari	19
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	21
The Opinion and Judgment of the Court Below	21
Jurisdiction	21
Federal Constitutional Provision Involved	21
Error to Be Urged—Restatement of Question Presented	21
Concise Statement of the Case	23
Summary of the Argument	27
Argument	28
I. Certiorari Is the Proper Procedure to Test a Question Involving Denial by State Courts of Full Faith and Credit to Judicial Proceedings of Other States	28
II. Under the Full Faith and Credit Provision of Article IV of the Federal Constitution, the Courts of One State Must Give the Same Recognition and Force to the Judicial Pro-	

PAGE

ceedings of the Courts of Other States as the Courts of Such Other States Give to Their Own Judicial Proceedings 28

III. Clearly the Findings and Decree of the Colorado District Court, as Affirmed by the Colorado Supreme Court, Are Contrary to the Findings of Fact, Judgment and Decree of the Kansas Court 29

IV. The Judgment and Decree of the Kansas Court, Including the Findings of Fact Upon Which Such Judgment and Decree Is Based, Is Res Judicata Under the Kansas Laws and Decisions and Must Be Given the Same Res Judicata Effect in Colorado in Order to Meet the Requirements of the Full Faith and Credit Provision of Article IV of the Federal Constitution 32

V. The Kansas Court Has Found and Decreed the Property Division Evidenced by the Property Settlement Agreement to Be Fair and Equitable in a Manner Binding Upon the Colorado Courts Under the Federal Constitution Even Though the Property Settlement Agreement Be Held Not to Be a Part of the Kansas Court Decree 34

VI. The Kansas Decree Was a "Consent Decree" and Is, Therefore, Res Judicata and Binding Upon the Parties Consenting Thereto Irrespective of Any Question as to the Basic Jurisdiction of the Kansas Court Entering Such Decree 40

PAGE

VII. The Only Fraud Found to Exist by the Colorado Court Is So-called "Extrinsic Fraud". No "Extrinsic Fraud" Appears from the Record and Escape from Compliance with the Full Faith and Credit Requirements of the Federal Constitution Cannot Be Justified on the Theory of Extrinsic Fraud 43

VIII. The Ultimate Conclusions of Law Announced by the Colorado Courts Are Startling and Revolutionary 46

IX. The Federal Question Raised Throughout This Case 48

X. The Finality of the Judgment to Which This Petition Is Directed 48

CITATIONS.

CASES:

Baldwin v. Baldwin, 150 Kan. 807, 96 P. (2d) 614, 617.. 41

Bates v. Bodie, 245 U. S. 520, 62 L. Ed. 444 43

Brooks v. National Bank of Topeka, 153 Kan. 831, 113 P. (2d) 1069, 1074 43

Bullis v. First National Bank of Idaho Springs, Colorado, 40 Colo. 253, 258, 90 P. 634 45

Cowle v. Cowle, 114 Kan. 605, 220 P. 211..... 40

Eaton v. Koontz, 138 Kan. 267, 25 P. (2d) 351..... 45

Electric Plaster Co. v. Blue Rapids City Tp., 81 Kan. 730, 106 P. 1079, 1081 45

Hullet v. Hullet, 133 Kan. 738, 3 P. (2d) 470..... 38

PAGE

Laidler v. Peterson, 150 Kan. 306, 92 P. (2d) 18 45

McNergney v. Harrison, 148 Kan. 843, 84 P. (2d) 944.. 45

Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278 ..... 19, 28

Newton v. Consolidated Gas Company of New York, 265 U. S. 78, 68 L. Ed. 909..... 50

Petty v. Petty, 167 Kan. 510, 207 P. (2d) 428..... 17, 36

Potts v. West, 124 Kan. 815, 262 P. 569..... 45

Putnam v. Putnam, 126 Kan. 479, 268 P. 797..... 45

Republic Natural Gas Co. v. State of Oklahoma, 334 U. S. 62, 92 L. Ed. 1212..... 50

Roche v. McDonald, 275 U. S. 449, 48 S. Ct. 142, 72 L. Ed. 365 ..... 19, 28

Schlosser v. Hemphill, 198 U. S. 173, 49 L. Ed. 1000..... 43

Titus v. Wallick, 306 U. S. 282, 59 S. Ct. 557, 83 L. Ed. 653 ..... 19, 28

Union National Bank v. Lamb, 337 U. S. 38, 93 L. Ed. 888 (Adv. Op.) 19, 28

United States National Bank of Denver, etc., v. Bartges, 210 P. (2d) 600 (Adv. Op.) 2, 21

MISCELLANEOUS:

Article IV, Section 1, United States Constitution..... 3, 21

Title 28, U.S.C., Section 1257, Subdivision (3) 3, 20

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949.

No. .....

UNITED STATES NATIONAL BANK OF DENVER and HILDRED J. DUNGAN, as Executors of the Estate of George P. Dickey, Deceased, PETITIONERS,

v.

RUBY DICKEY BARTGES, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO AND BRIEF IN SUPPORT THEREOF

The Petitioners herein respectfully pray for a Writ of Certiorari to review a Judgment of the Supreme Court of the State of Colorado entered in cause number 16003 on the docket of said Court in which the Petitioners herein are the Plaintiffs in Error and the Respondent herein is the Defendant in Error. Petitioners contend that said Judgment, to which this Petition is directed, violates Article IV of the Constitution of the United States in failing to give full faith and credit to a Judgment of the State District

Court within and for the County of Sedgwick, State of Kansas, more particularly hereinafter referred to.

Pursuant to Rule 38 (7) of this Court, there have been filed herein 10 copies of the record printed for use in this case in the Colorado Supreme Court in which have been incorporated the additions necessary to show the proceedings in the Colorado Supreme Court. This printed record as filed herein consists of two volumes, a large volume captioned "Transcript of Record" and a second volume captioned "Abstract of Exhibits", which, by reference is, in fact, a part of the printed record used in the Colorado Supreme Court. References to the large volume are by the use of the letter "R." and to the Abstract of Exhibits by the abbreviation "Abs. Ex.".

OPINION BELOW

The Judgment of the Supreme Court of the State of Colorado is in form an affirmance in part and a reversal in part of the "Findings and Decree" of the District Court within and for the City and County of Denver, State of Colorado, entered in said District Court on September 10, 1947, (R., pp. 73-95). The Opinion of the Colorado Supreme Court dated July 14, 1949, is not yet officially reported in the Colorado reports, but is reported in 210 P. (2d) 600 (Adv. Op.) and is found in the Record at page 420, et seq. Petition for Rehearing filed by Petitioners in the Colorado Supreme Court on July 30, 1949, (R., p. 444) was denied by the Colorado Supreme Court on October 3, 1949, (R., p. 491). The formal Judgment of the Colorado Supreme Court, together with the remand or remittitur of said cause by the Colorado Supreme Court to the District Court within and for the City and County of Denver, dated October 6, 1949, is found in the Record at page 496, et seq. It will be noted from the original Opinion that one Judge of the Colorado Supreme Court dissented therefrom and one additional Judge dissented when the Petition for Rehearing was denied.

JURISDICTION

As shown above, the Judgment of the Colorado Supreme Court became final, by denial of the Petition for Rehearing directed to the Colorado Supreme Court Opinion of July 14, 1949, on October 3, 1949, (R., p. 491). The jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1257, Subdivision (3).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved is Sec. 1, Article IV, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state".

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

George P. Dickey (now deceased) and Ruby A. Dickey, his wife, (now Ruby Dickey Bartges, the Respondent herein) were on October 27, 1943, and for a number of years prior thereto, and up to and including February 7, 1944, domiciled in the State of Kansas, residing in the City of Wichita, Sedgwick County, Kansas.

On October 27, 1943, Mrs. Dickey filed her Petition in the District Court of Sedgwick County, Kansas, in cause number A-9785 on the docket of said Court, (Abs. Ex., p. 12, et seq.) wherein she alleged that Mr. Dickey had been guilty of gross neglect of his marital duties and extreme cruelty towards her, and that since their marriage Mr. and Mrs. Dickey had jointly accumulated a large amount of property, most of which was held in the name of Mr. Dickey. In the prayer of her Petition, she prayed for an absolute decree of divorce, that she be awarded such portion of Mr. Dickey's property as to which she might in law and equity be entitled, judgment for costs including attorneys' fees and expenses, custody of two minor children and other incidental relief not material here.

On December 13, 1943, (Abs. Ex., p. 17, et seq.) Dickey filed his answer and cross-petition in which he denied that

he had been guilty of extreme cruelty or gross neglect and in which he admitted that some property had been accumulated by him during the married life of the parties, the principal portion of which was held in his name. In his cross-petition, as grounds for divorce which he prayed, he alleged that Mrs. Dickey had been guilty of extreme cruelty, gross neglect of duty, habitual drunkenness and adultery.

On December 15, 1943, Mrs. Dickey, in the Kansas action, filed a motion for property statement (Abs. Ex., p. 20). This motion was never called up for hearing, but, as appears from the decree by the Kansas Court (R., p. 20), was withdrawn.

On February 7, 1944, the District Court of Sedgwick County, Kansas, in the above referred to case, entered its Findings of Fact and Decree (R., pp. 9-17). As appears from that Decree, Dickey withdrew his cross-petition and the Court granted Mrs. Dickey a divorce upon her Petition. It further appears from this Decree that Mr. and Mrs. Dickey had reached an amicable settlement concerning their property and property rights and that this property settlement agreement was by the parties submitted to the Kansas Court and considered by that Court.

A copy of the property settlement agreement between Mr. and Mrs. Dickey, dated February 7, 1944, appears in the Record at pages 25, et seq. In addition to certain specific items of property set off to Mrs. Dickey under this agreement, she was given $325,000 in cash. While this sum was paid Mrs. Dickey in cash, because of her admitted improvidence, she, simultaneously with the execution of the property settlement agreement and the entry of the divorce decree by the Kansas Court, created a spendthrift trust with $250,000 of the settlement money under which she receives $550 per month, income tax free, plus allowance for emergencies, with remainder over upon her death of the unexpended portion of the trust fund to certain trusts theretofore created by Mr. Dickey for the two children of Mr. and Mrs. Dickey. This

trust agreement executed by Mrs. Dickey is found at pages 35, et seq., of the Abstract of Exhibits.

We now set forth and quote the portions of the Kansas Court's Findings of Fact and Decree of February 7, 1944, relating to property division between Mr. and Mrs. Dickey which Petitioners herein contend have been denied full faith and credit by the Colorado Courts, contrary to Article IV of the Federal Constitution.

The Kansas Court found as follows (R., p. 10):

> "Thereupon, it was announced to the court that the parties hereto had reached an amicable settlement concerning their property and property rights, which property settlement was by the parties submitted to the court for consideration of the court, and the court, being duly advised in the premises, finds that said property settlement, under the circumstances, is a fair and equitable division of the properties accumulated by the parties during said marriage and that the same should be approved by the court."

The Kansas Court ordered, adjudged and decreed as follows (R., p. 13):

> "Second: That the property settlement made between the parties hereto be, and the same is hereby, approved by the court, and that said division of property and the settlement of their mutual rights is fair, reasonable and equitable under all the circumstances, and that the court makes no order for the payment of any alimony to the plaintiff in this case."

The Kansas Court further ordered, adjudged and decreed as follows (R., p. 16):

> "Seventh: It is further ordered by the court that each of the parties hereto be, and they each are hereby, permanently and perpetually enjoined from claiming or asserting any right, title or interest in and to the

property of the other as the same is established by the property settlement of the parties, or in and to any property which either party may hereafter acquire by purchase, gift, descent, or otherwise."

The Record shows that the Findings of Fact and Decree entered by the Kansas Court was approved by both the Plaintiff in the divorce and property division action, Ruby A. Dickey, and the Defendant in that action, George P. Dickey, through their respective attorneys (R., p. 17). It thus appears that the Decree of the Kansas Court, at least in so far as the property settlement is concerned, was a "consent decree" approved by both parties to said action.

Thereafter and on September 18, 1945, more than one year and seven months after the entry of the divorce and property settlement decree by the Kansas Court, Ruby A. Dickey, who by that time had married a Mr. Bartges and whose name was then Ruby Dickey Bartges, instituted the action involved in this case in the State District Court in Denver, Colorado, under her then name of Ruby Dickey Bartges, against her former husband, George P. Dickey. The Complaint in this suit is shown in the Record at pages 2-34.

An analysis of this Complaint will show that therein the former Mrs. Dickey, now Mrs. Bartges, alleged that she was induced to enter into the February 7, 1944, property settlement agreement with Mr. Dickey in reliance upon certain specific representations made by or in behalf of Mr. Dickey, which she claimed were false and fraudulent. In her Complaint she specifically and expressly alleges, as grounds for her claimed relief, that Mr. Dickey, pursuant to her request, presented to her a financial statement which purported to show his actual worth and that to his financial worth statement were attached financial statements of two corporations which Mr. Dickey controlled through stock ownership. She then alleges that the financial statement of his worth, as submitted by Mr. Dickey, showed his actual worth to be con-

siderably less than what he was actually worth and that she relied upon this financial statement and his oral representations as to his actual worth in entering into the February 7, 1944, property settlement agreement. She alleges that she would not have entered into the property settlement agreement had she not relied upon the representations so specifically and expressly made by Mr. Dickey as to his actual worth. She alleges that the data furnished her by Mr. Dickey indicated his net worth to be very much less than $6,000,000 which she claimed he was actually worth (R., pp. 2-8). As a result of the alleged fraud so specifically and expressly set forth in the Complaint, Mrs. Bartges asked for judgment against Mr. Dickey in the sum of $2,000,000.

It will thus be seen that this claim for money judgment in the amount of $2,000,000 was based upon certain specific and express fraudulent representations claimed to have been made by Mr. Dickey which induced Mrs. Bartges to enter into the February 7, 1944, property settlement agreement.

The Complaint filed by Mrs. Bartges in this action incorporates therein and attaches thereto as exhibits the February 7, 1944, Findings of Fact and Decree entered by the State District Court of Sedgwick County, Kansas, hereinabove referred to, (R., pp. 9-24) and the February 7, 1944, property settlement agreement (R., pp. 25-34).

From this it is clear that from the very outset the Respondent herein (Mrs. Bartges) has been claiming that she is entitled to relief by the Colorado Courts, notwithstanding the property settlement agreement and the judgment of the Kansas Court, both of which she expressly pleaded and incorporated in her Complaint filed in the Colorado Court action. The Court will have in mind that, as brought, the Colorado Court action was, on its face, an action at law to recover damages alleged to have been sustained by the present Mrs. Bartges because of the false representations alleged to have been made by Mr. Dickey in inducing the then Mrs. Dickey to

enter into the February 7, 1944, property settlement agreement, and she claims the right to recover in this action, notwithstanding the February 7, 1944, property settlement agreement and the February 7, 1944, Findings of Fact and Decree entered by the Kansas Court.

As above stated, George P. Dickey was the defendant originally named in this action. During the pendency of the action and on February 20, 1946, Mr. Dickey died (R., p. 36). The Petitioners herein were duly appointed as Executors of his Estate by the County Court of Denver, and on July 8, 1946, the Petitioners, as such Executors, were substituted as defendants in the case (R., p. 41). Subsequently and on August 30, 1946, your Petitioners, as Executors of the Dickey Estate, filed their answer in the State District Court at Denver to the complaint consisting of thirteen separate defenses (R., pp. 41-60). The "Thirteenth Defense" in said answer (R., pp. 59-60) expressly relied upon the full faith and credit provisions of Article IV of the Federal Constitution as a defense to the action upon the grounds that the complaint constituted an attack upon the decree of the District Court of Sedgwick County, Kansas, and that any relief which might be granted the plaintiff in this case would necessarily constitute the violation of and the vacating and setting aside and annulment of the Kansas Court decree. This Thirteenth Defense in the answer expressly relying upon the full faith and credit provisions of Article IV of the Federal Constitution followed various defenses, including the Second Defense (R., p. 52) that the Colorado Courts were without jurisdiction to grant any relief to the plaintiff and the Sixth Defense (R., pp. 51-53) that the Kansas decree was res judicata and barred any relief in the present action brought in the Colorado Court.

The case came on for trial in the State District Court, Denver, in March 1947 (R., p. 73) at which a volume of evidence was introduced (R., pp. 108, et seq.). On September 10, 1947, the State District Court, Denver, through Judge

Joseph J. Walsh, entered its "Findings and Decree" which is set forth at length at pages 73-95 of the Record. *The Trial Court expressly found that George P. Dickey was not guilty of any affirmative fraud as alleged in the complaint which induced his wife, the then Mrs. Dickey, to enter into the February 7, 1944, property settlement agreement, but, notwithstanding this finding, concluded and held that Mr. Dickey was guilty of fraud in law which the Trial Court denominated as "extrinsic fraud" in entering into the settlement agreement with his wife because and only because of the amount of his wealth as compared to the amount allowed the wife under the property settlement agreement.* Premised upon these findings of fraud in law as distinguished from actual fraud, the Trial Court found that Respondent, plaintiff in the case below, was entitled to an additional portion of her former husband's estate, which the Trial Court proceeded to give her in form hereinafter related.

We quote the following pertinent excerpts from the Trial Court's "Findings and Decree":

> "First: That at the time of the marriage of the parties George P. Dickey was possessed of little means and that the sizeable estate of which he eventually became possessed, amounting to somewhere between five and six million dollars, was accumulated during the married life of the parties;
>
> "Second: That George P. Dickey was not guilty of any affirmative fraud in the presentation of the statement of his financial worth which was furnished in pursuance of the motion made for a disclosure of his property. * * *" (R., p. 79)

> "* * *. It is for this reason that the Court has come to the conclusion that Dickey was not guilty of fraud in not furnishing a financial statement showing his exact wealth.

"Third: The evidence further shows and convinces the Court that the matter of George P. Dickey's wealth did not seriously enter into the negotiations of the parties whereby there was contemplated any real division of property based on the marriage relation that had existed for twenty years. That neither Mrs. Dickey nor her counsel, Mr. Foulston, was under any duress during the negotiations, nor was there any coercion on the part of Mr. Dickey or his counsel in the making of the settlement agreement. That any duress or coercion was created by Mrs. Dickey herself due to her conduct so that she could marry Mr. Bartges as soon as possible. That counsel for plaintiff recognized that Mrs. Dickey was improvident and felt for her best interests that if she could be assured of a monthly income for life whereby her needs could be taken care of, that that would be to her best advantage. On the other hand, George P. Dickey apparently was insisting that in any settlement a trust be established which would provide such monthly income and that he would not go in excess of an amount that would produce $550.00 monthly to his wife for her lifetime. Her misconduct is offset to some extent by the fact that apparently recognizing her improvidence she did not insist on a lump sum, but agreed that $250,000.00 of the $325,000.00 be set up in a trust agreement, any sum remaining on her death to go to her children." (R., pp. 80-82)

"Fifth: That the settlement made by Dickey on his wife of twenty years, considering his wealth, was niggardly and, to say the least, not what her counsel would have accepted for her, nor what any court would have granted her, providing there had not been conduct on her part that resulted in this settlement.

"Sixth: That George P. Dickey recognized that

his wife was entitled to an adequate income for life, as is attested by his entering into the settlement agreement. But being a man worth at least two and a half million, knowing that his wife had no independent estate, that she was relinquishing all right to an already established trust of $250,000.00, and considering his wealth after twenty years of married life, to allow her $550.00 per month stamps the agreement as being inadequate and unfair and he was, therefore, guilty of extrinsic fraud in entering into such an agreement.

"The Court fully realizes that Mr. Dickey was aggravated at the thought of another supplanting him in the affections of his wife, and that he did not want Mr. Bartges to profit in anyway by the settlement, and probably did all he could to injure Bartges thereafter. This does not, however, once he recognized the right of his wife to an adequate income, relieve him of the necessity of making that adequate and fair." (R., pp. 82-83)

Based upon these findings, the Trial Court found that it had jurisdiction of the subject matter of the suit by reason of the fact that, at the time of the institution of the action, both parties were citizens of the State of Colorado and not subject to the jurisdiction of the Kansas Court which granted the divorce (R., pp. 91-92). The Court further found:

"II. The answer to the second question, in the opinion of the Court is that Ruby Dickey Bartges did not receive an adequate and fair settlement. The Court finds that the agreement of settlement on its face, which shows that she received only $75,000.00 in cash and $550.00 per month for life from a trust fund which she voluntarily set up, is inadequate and unfair considering the wealth of Mr. Dickey—whether that wealth was two and a half million dollars or between five and six million dollars, and in this con-

nection it must be remembered that she relinquished all right in a previous trust of $250,000.00 that had been established for her.

"III. To the third question, while the Court cannot condone the misconduct of the plaintiff and the same is to be censured in positive terms, nevertheless, despite her misconduct the Court feels that she is entitled to further consideration in this matter by reason of the fact that the contract of settlement on its face, considering Mr. Dickey's wealth, was inadequate and unfair.

"IV. To question 4, the Court, having determined that her misconduct is not to be a bar to her obtaining further relief, is concerned then with what that relief should be. Mr. Foulston, her able counsel, has indicated that Mrs. Bartges is improvident and should not be entrusted with the handling of any large sum of money; that Mr. Foulston knew what he was doing and was acting for the best interests of the plaintiff in setting up a trust that would provide her a monthly income for life. This Court feels that if this monthly income were increased to a sum somewhat commensurate with the wealth of George P. Dickey and to what the plaintiff should and could be reasonably entitled to, that justice would be done.

"Accordingly, the Court will decree that the defendants be required to establish, for the benefit of the plaintiff Ruby Dickey Bartges, a trust sufficient to produce her the additional sum of $450.00 per month. This, with the trust already established at the First National Bank of Wichita, Wichita, Kansas, will give her a life income of $1,000 per month.

"The Court will further decree that said trust agreement shall be irrevocable and shall comprise the same terms and agreements as contained in the

irrevocable trust agreement made the 7th day of February, A. D. 1944 between Ruby A. Dickey and the First National Bank of Wichita and that it shall terminate and cease upon her death and that any portion of the trust estate remaining undistributed in the hands of the trustee shall be disposed of in accordance with Article 5 of the present trust agreement." (R., pp. 92-94)

The decree of the Trial Court is as follows:

"It is, Therefore, Ordered, Adjudged and Decreed that the plaintiff, Ruby Dickey Bartges, shall receive in addition to the $550.00 per month she is now receiving, an additional monthly income for life of $450.00 commencing October 1, 1947, and to this end and purpose the defendants are required to place in trust a sum sufficient to produce said monthly sum; that the plaintiff shall be required to execute an irrevocable trust agreement embodying and comprising the same terms and conditions as are embodied in that certain indenture made the 7th day of February A. D. 1944 between Ruby A. Dickey, of Wichita, Sedgwick County, Kansas, therein designated as the 'Settlor', and the First National Bank of Wichita, a corporation of Wichita, Sedgwick County, Kansas, therein designated as the 'Trustee,' and introduced in evidence in the trial of this cause as 'Defendant's Exhibit No. 2,' and specifically that said irrevocable trust agreement shall embody the terms and conditions of Article 5 of said irrevocable trust agreement of February 7, 1944, providing for the distribution of the remainder in said trust, if any, in the event of the death of the plaintiff, Ruby Dickey Bartges, to her children, George P. Dickey, Jr., and Diana R. Dickey. In other words, in the event of the death of Ruby Dickey Bartges any sum remaining in said trust shall be delivered, one share to the trustees of the trust

known as the George P. Dickey, Jr., and one share to the trustees of the trust known as the Diana R. Dickey trust, both of which trusts were created by George P. Dickey as Settlor and the First National Bank of Wichita, of Wichita, Kansas, George P. Dickey and Hildred J. Dungan as Trustees, on the 24th day of December, 1941." (R., pp. 94-95).

It will be seen from the above quoted excerpts from the Trial Court's Findings and Decree that, even though this was an action brought as an action at law to recover damages based upon affirmative fraud alleged in the complaint and even though the Trial Court found that Mr. Dickey was not guilty of fraud or duress as a matter of fact which induced the then Mrs. Dickey to enter into the property settlement agreement, it was, nevertheless, held that Mr. Dickey was guilty of so-called "extrinsic fraud" or fraud in law in giving his wife, by way of the property settlement agreement, only $325,000.00 (plus miscellaneous items) in view of his wealth, whether that wealth be two and a half million dollars or between five and six million dollars (R. p. 92).

The Trial Court, however, did not enter a money judgment in favor of Mrs. Bartges payable in cash, but ordered the Executors of the Dickey Estate to create a trust out of the Estate property sufficient to pay Mrs. Bartges an additional $450.00 per month over and above the $550.00 per month which she is now receiving out of the trust created from the $250,000.00 of the property settlement.

The Trial Court entered this character of judgment in the face of the various defenses, including the defense expressly pleaded, commented upon above, that such a judgment would deny full faith and credit to the Findings and Decree of the Kansas Court entered on February 7, 1944.

Both parties sought review of the Denver District Court judgment in the Colorado Supreme Court. Supersedeas by consent was granted by the Colorado Supreme Court (R. p. 411).

The grounds of error of the Petitioners herein, who appeared as Plaintiffs in Error in the Colorado Supreme Court, are shown in their "Specification of Points" (R., p. 411). It will be seen that in Specification of Points numbered 1, 2 and 3 Petitioners expressly relied upon and presented to the Colorado Supreme Court their contention that the Colorado Court had no jurisdiction of the subject matter of the action, that the Kansas judgment and decree of February 7, 1944, was res judicata and barred any relief in the present action, and that the judgment and decree of the Trial Court constituted the vacating and setting aside and the annulment or modification of the findings, judgment and decree of the Kansas Court, all in violation of the full faith and credit provision of Article IV of the Constitution of the United States.

Respondent herein (Mrs. Bartges), as Defendant in Error in the Colorado Supreme Court, filed her "Cross Specification of Points" which are found in the Record at Page 418. Thereafter and on July 14, 1949, the Colorado Supreme Court (one Judge then dissenting and another dissenting upon the denial of the Petition for Rehearing) handed down its Opinion (R., p. 420) (210 P. (2d) 600 (Adv. Op.)). The Colorado Supreme Court, as will be seen, overruled Petitioners' contention based upon the full faith and credit provision of the Federal Constitution and expressly held that the Kansas decree was not res judicata of the issues involved in this action and that, consequently, the full faith and credit provision of the Federal Constitution was not violated by the relief given to Mrs. Bartges. The particular language in the Colorado Supreme Court Opinion pertinent to this question is under Subdivisions First and Second found at pages 428-435 of the Record and at pages 604-607 of the Pacific Reporter.

In so far as the Trial Court held and decreed that Mrs. Bartges was entitled to an additional portion of Mr. Dickey's estate, the Colorado Supreme Court, it will be seen, affirmed

the judgment of the Trial Court, including the findings of the Trial Court that there was no actual fraud and also including and affirming the findings and theory of the Trial Court that it is fraud in law for a man of the wealth of Mr. Dickey to give his wife the sum which she did receive under the property settlement agreement and which is covered by the Kansas Court decree, even though there was no actual fraud or duress which induced the wife to enter into the agreement. However, it will also be seen from the Colorado Supreme Court Opinion that the Trial Court's judgment was reversed in so far and in so far only as the Trial Court required the additional amount to which it found Mrs. Bartges was entitled to be invested in a trust under which she would receive an additional $450.00 per month for her life, with any unexpended balance at the time of her death to go to the trusts of her children theretofore created by Mr. Dickey.

The concluding language of the Supreme Court majority Opinion is as follows:

> "The judgment of the trial court is affirmed in so far as it sustains the right of plaintiff to recover damages. The judgment is reversed in so far as it purports to create a trust for the benefit of plaintiff. The cause is remanded with directions to enter a money judgment for such sum as shall be determined by the court, from the evidence heard upon the trial, as will result in a fair and equitable division of property as required under Kansas law. All costs of suit should be taxed against the defendants." (210 P. (2d) 610 (Adv. Op.)) (R., p. 444.)

Petitioners herein (Plaintiffs in Error in the Colorado Supreme Court) filed their Petition for Rehearing in that Court (R., p. 444). In that Petition for Rehearing (R., pp. 470-483) Petitioners again expressly raised and relied upon the full faith and credit protection of Article IV of the Federal Constitution.

In addition to the argument made in this Petition for Rehearing, Petitioners filed with the Colorado Supreme Court a Supplemental Memorandum in support of the Petition for Rehearing, (R., p. 487) again emphasizing the full faith and credit Constitutional defense and calling the Colorado Supreme Court's attention to Kansas Supreme Court cases, including the case of *Petty v. Petty*, decided by the Kansas Supreme Court on June 11, 1949, 167 Kan. 510, 207 P. (2d) 428, hereinafter more fully referred to in the supporting Brief.

The Colorado Supreme Court denied the Petition for Rehearing on October 3, 1949, (R., p. 491).

The formal judgment of the Colorado Supreme Court reads as follows (R., p. 497):

> "This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that the judgment of the said District Court should be affirmed in part and reversed in part,
>
> "It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed in part and reversed in part in conformity with the conclusions announced in the opinion of the Court filed herein, and that this cause be remanded to said District Court which is instructed to modify the decree in accordance herewith.
>
> "It is further ordered and adjudged that the defendant in error do have and recover of and from said plaintiffs in error her costs in this Court expended, to be taxed."

On October 5, 1949, Petitioners filed in the Colorado Supreme Court their Motion for stay of issuance of mandate pending application to this Court for certiorari, which Motion was denied on October 6, 1949, (R., p. 492).

Thereafter Petitioners filed their Motion in this Court to recall the mandate pending application for certiorari, which Motion was denied by this Court on October 24, 1949.

QUESTION PRESENTED

Where an action for divorce and property division is brought by a wife against a husband in a State Court of Kansas of competent jurisdiction of the parties and the subject matter, and during the pendency of the action the husband and wife enter into a property settlement agreement, which property settlement agreement, as found by the Colorado Court in the action here involved, was not induced by any factual fraud or duress, and at the trial of the action in which the wife is granted a divorce the property settlement agreement is submitted to the Kansas Court and considered by the Court, and, although the property settlement agreement is not incorporated as such in the decree, the Kansas Court finds that the property settlement evidenced by the property settlement agreement is a fair and equitable division of the properties accumulated by the parties during the marriage and should be approved by the Court, and the Kansas Court, by its judgment and decree, approved and consented to by both parties to said action finds the division of property evidenced by the property settlement agreement to be reasonable and equitable under all the circumstances and enjoins each of the parties from claiming or asserting any right, title or interest in the property of the other as evidenced by the property settlement agreement, are such findings of fact, judgment and decree of the Kansas Court res judicata and entitled to full faith and credit under Article IV of the Constitution of the United States so as to bar the wife from recovering an additional amount of the husband's property in an action subsequently brought in a

Colorado Court in the form of an action at law for damages based upon alleged affirmative fraud where such affirmative fraud, as well as duress and coercion, are found not to exist and where the Colorado Court's judgment is based solely upon its finding that the property division was unfair and inequitable in the light of the husband's wealth and, consequently, the husband was guilty of so-called "extrinsic fraud" in connection therewith?

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

The reasons relied on for the allowance of this Writ of Certiorari are as follows:

1. By denying full faith and credit to the Kansas judgment, the Colorado Court has denied Petitioners their right under Section 1, Article IV, of the Constitution of the United States to have such judgment given full faith and credit. *Roche v. McDonald,* 275 U. S. 449, 48 S. Ct. 142, 72 L. Ed. 365; *Titus v. Wallick,* 306 U. S. 282, 59 S. Ct. 557, 83 L. Ed. 653; *Milliken v. Meyer,* 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278; *Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 888 (Adv. Op.).

2. There is presented a Federal question of substance which has been decided by the Colorado Supreme Court in a way not in accord with the applicable decisions of this Court as indicated by the cases just cited.

3. Compliance by the Courts of one State with the requirement of Section 1, Article IV, of the Federal Constitution, that full faith and credit be given to the judgments of the other States is a matter of great public importance.

4. As Petitioners firmly believe, as will be more fully shown in the supporting Brief, the Colorado Supreme Court has failed to give full faith and credit to the judgment of the Kansas Court and, in doing so, has denied to these Petitioners the protection to which they are entitled under the full faith and credit provision of the Federal Constitution.

WHEREFORE, because of the importance of the question involved and for the reasons hereinabove set forth, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Colorado, to the end that said cause may be reviewed and determined by this Court, as provided by Title 28, U.S.C., Sec. 1257, Subdivision (3), and the Rules of this Court, and that your Petitioners may have such other and further relief in the premises as this Court may deem appropriate and in conformity with the provisions of said laws and Rules, and that the judgment of the Supreme Court of Colorado be reversed, with directions to the District Court within and for the City and County of Denver to enter judgment in favor of the Petitioners dismissing the complaint filed in said action.

KARL F. CRASS,
Equitable Building,
Denver, Colorado,

JOHN P. AKOLT, JR.,
R. A. DICK,
JOHN P. AKOLT,
1300 Telephone Building,
Denver, Colorado,
Attorneys for Petitioners.

AKOLT, CAMPBELL, TURNQUIST & SHEPHERD
Telephone Building
Denver, Colorado

Of Counsel

December 1949.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This Brief is respectfully submitted in support of the foregoing Petition for Writ of Certiorari.

THE OPINION AND JUDGMENT OF THE COURT BELOW

The Opinion of the Colorado Supreme Court, to which this Petition for Writ of Certiorari is directed, is not as yet officially reported in the Colorado Supreme Court reports, but is found in 210 P. (2d) 600 (Adv. Op.) captioned *United States National Bank of Denver, etc., v. Bartges.* It is found in the Record submitted herewith at page 420.

The Judgment of the Colorado Supreme Court is found in the Record at page 496.

JURISDICTION

The ground on which jurisdiction of this Court is invoked is set forth at page 3, supra.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

The Federal Constitutional provision involved is Section 1, Article IV, of the United States Constitution, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state".

ERROR TO BE URGED

RESTATEMENT OF QUESTION PRESENTED

The error to be urged is the failure of the Colorado Supreme Court, in violation of Section 1, Article IV, of the Federal Constitution, to give full faith and credit to the judgment of the District Court of Sedgwick County, Kansas. We restate here the "Question Presented" as set forth in the Petition at page 18, supra:

QUESTION PRESENTED

Where an action for divorce and property division is brought by a wife against a husband in a State Court of Kansas of competent jurisdiction of the parties and the subject matter, and during the pendency of the action the husband and wife enter into a property settlement agreement, which property settlement agreement, as found by the Colorado Court in the action here involved, was not induced by any factual fraud or duress, and at the trial of the action in which the wife is granted a divorce the property settlement agreement is submitted to the Kansas Court and considered by the Court, and, although the property settlement agreement is not incorporated as such in the decree, the Kansas Court finds that the property settlement evidenced by the property settlement agreement is a fair and equitable division of the properties accumulated by the parties during the marriage and should be approved by the Court, and the Kansas Court, by its judgment and decree, approved and consented to by both parties to said action, finds the division of property evidenced by the property settlement agreement to be reasonable and equitable under all the circumstances and enjoins each of the parties from claiming or asserting any right, title or interest in the property of the other as evidenced by the property settlement agreement, are such findings of fact, judgment and decree of the Kansas Court res judicata and entitled to full faith and credit under Article IV of the Constitution of the United States so as to bar the wife from recovering an additional amount of the husband's property in an action subsequently brought in a Colorado Court in the form of an action at law for damages based upon alleged affirmative fraud where such affirmative fraud, as well as duress and coercion, are found not to exist and where the Colorado Court's judgment is based solely upon its finding that the property division was unfair and inequitable in the light of the husband's wealth and, consequently, the husband was guilty of so-called "extrinsic fraud" in connection therewith?

CONCISE STATEMENT OF THE CASE

A summary and short statement of the case and the matter involved is set forth at page 3, et seq., supra, reference to which is hereby made.

In the summary statement, supra, we have set forth in chronological order the developments involved in this litigation from the time of the institution of the divorce and property division suit by the then Mrs. Dickey against Mr. Dickey which led to the findings of fact, judgment and decree of the District Court of Sedgwick County, Kansas, on February 7, 1944, down to the judgment of the Colorado Supreme Court which, if sustained, will result in the former Mrs. Dickey (now Ruby Dickey Bartges, the Respondent herein) receiving an additional portion of the Dickey Estate assets. Before proceeding with our argument proper, we will here further summarize the statement of facts set forth in the Petition herein. These facts so briefly summarized show the following:

1. In 1943 and for a number of years prior thereto Mrs. Dickey (Respondent herein), now through remarriage named Ruby Dickey Bartges, and George P. Dickey (now deceased), with the Petitioners herein being Executors of his Estate, were husband and wife and residents of Sedgwick County, Kansas.

2. In the Fall of 1943 Mrs. Dickey instituted an action in the State District Court of Sedgwick County, Kansas, against Mr. Dickey, asking for a divorce and a property division. To this complaint Mr. Dickey filed a cross-complaint.

3. On February 7, 1944, the case came on for trial in the District Court of Sedgwick County, Kansas. At that time Mr. Dickey withdrew his cross-complaint for a divorce and there was a trial upon Mrs. Dickey's claim for divorce and property division. Also at that time there was presented

to the District Court of Sedgwick County, Kansas, the property settlement agreement entered into between Mr. and Mrs. Dickey on February 7, 1944.

4. The District Court of Sedgwick County, Kansas, on February 7, 1944, entered its Findings of Fact, Judgment and Decree, found in the Record at page 9, et seq., which was consented to and approved by both Mr. and Mrs. Dickey, through their respective attorneys, in which, as shown from the quotations therefrom at pages 5, 6 in the Petition, supra, the Kansas District Court found that it had considered the property settlement agreement and found that that property settlement agreement evidenced a fair and equitable division of the properties of Mr. and Mrs. Dickey. Then, based upon these findings, the Kansas District Court adjudged and decreed that the property settlement between Mr. and Mrs. Dickey was fair, reasonable and equitable and also enjoined both parties from asserting any claim to the properties of the other not set forth in the property settlement agreement.

There is no question involved as to the jurisdiction of the Kansas Court, both of the parties to that action and of the subject matter, and the Findings of Fact, Judgment and Decree of the Kansas Court is affirmatively pleaded as a part of the complaint later filed by the Respondent herein in the Colorado Court in the action now under consideration.

5. Some nineteen months after the February 7, 1944, Findings of Fact, Judgment and Decree of the Kansas Court, Respondent herein, under her then name of Ruby Dickey Bartges, instituted the present action in the State District Court at Denver, Colorado. In her complaint in that action (R., pp. 2-34), after incorporating therein, as a part thereof, the February 7, 1944, Findings of Fact, Judgment and Decree of the Kansas Court and the property settlement agreement of February 7, 1944, Respondent proceeds to state that she was induced to enter into that property settlement agreement in reliance upon Mr. Dickey's representations, alleged to have been made orally and through certain written financial

statements submitted, that he was of an actual worth of a certain amount of money; that these representations were false and fraudulent and were made for the purpose of inducing her to enter into the property settlement agreement, and that she entered into the property settlement agreement in reliance thereon, but that, as a matter of fact, his actual worth was largely in excess of the amount which he is claimed to have represented it to be and which the financial statements submitted would indicate it to be.

As shown in the Statement, Mr. Dickey died during the pendency of this action, and Petitioners herein, as Executors of his Estate, were substituted as defendants. In due course Petitioners, as such Executors, filed their Answer to the complaint in the State District Court at Denver, consisting of thirteen separate defenses (R., pp. 41-59), which Answer, among the other defenses, included the express defense that the Colorado Court could not grant any relief to the plaintiff, in view of the Kansas Court's Findings of Fact, Judgment and Decree, without violating the full faith and credit provision of Section 1, Article IV, of the Federal Constitution.

After an extended trial, the State District Court at Denver entered its "Findings and Decree" (R., pp. 73-95) from which we have quoted the pertinent excerpts at pages 9 to 14 of the Petition, supra. These quoted excerpts will show that the Trial Court found that Mr. Dickey was not guilty of the fraud alleged in the complaint and was not guilty of any duress or coercion which induced the then Mrs. Dickey to enter into the property settlement agreement. However, the Denver District Court did make a finding to the effect that for a husband worth from two and a half million dollars to between five and six million dollars to enter into a property settlement agreement in connection with a divorce in Kansas under which the wife received only $325,000, plus some miscellaneous properties, was inadequate and inequitable and constituted what the Denver District Court denominated as "extrinsic fraud" notwithstanding that there

was no fraud, duress or coercion in fact which induced the wife to enter into the property settlement agreement. The substance of this finding and the theory upon which it is based is that, under the Kansas law, it is impossible for a husband to enter into a property settlement agreement with his wife, absolutely free of fraud or duress, in an amount which is agreeable to the wife, as evidenced by such non-fraudulent and non-coercive agreement, if a Court shall subsequently find that, in that Court's opinion, the division was inequitable or unjust solely in relation to the wealth of the husband.

The Denver District Court entirely ignored the full faith and credit defense based upon the Federal Constitution and the Kansas divorce decree and grounded its jurisdiction upon the sole fact that the former Mrs. Dickey and Mr. Dickey, at the time of the institution of the action in Colorado, were both residents of Colorado (R., pp. 91-92).

As shown in the Statement set forth in the Petition, pursuant to agreement in connection with the property settlement agreement, $250,000 out of the $325,000 cash settlement involved in that agreement was used to create a spendthrift trust under which Mrs. Dickey would receive $550.00 per month, income tax free, plus emergency allowances, during her lifetime, with remainder over, if any, to the trusts for the two children of Mr. and Mrs. Dickey.

The State District Court of Denver, after finding that there was no fraud, duress or coercion in fact, but finding, as it did, that there was so-called extrinsic fraud because of the amount of the settlement in view of Mr. Dickey's wealth, but in recognition of the admitted improvident nature of Mrs. Bartges, ordered and adjudged that the Executors of the Dickey Estate create a new trust, similar to the $250,000 trust just above mentioned, under which Mrs. Bartges will receive an additional $450.00 per month for her life, with remainder over, if any, to the two children.

Both Mrs. Bartges and the Executors took this State District Court judgment to the Colorado Supreme Court. The Colorado Supreme Court has affirmed the State District Court in so far as the District Court held that Mrs. Bartges is entitled to a judgment against the Executors and the Dickey Estate, but has reversed the State District Court in so far as the State District Court held that the amount of the relief granted should be tied up in a trust under which Mrs. Bartges will only receive a monthly allowance rather than giving her the total amount in the form of a money judgment.

The above, briefly, is the nature of the case which is now submitted to this Court and the judgment which Petitioners claim deprives the February 7, 1944, Findings, Judgment and Decree of the Sedgwick County, Kansas, District Court of the protection due it under the full faith and credit provision of Section 1, Article IV, of the Federal Constitution.

SUMMARY OF THE ARGUMENT

1. Full faith and credit must be given valid and subsisting judgments of Courts of one State by Courts of other States.

2. The February 7, 1944, Findings of Fact, Judgment and Decree of the State District Court of Sedgwick County, Kansas, is, under the Kansas law, res judicata on the questions purported to be adjudicated by the Colorado Court as to whether the property settlement between the Respondent herein (the former Mrs. Dickey) and Mr. Dickey (now deceased) was fair and equitable and as to whether either of the parties may assert any further right to the property of the other inconsistent with the property settlement agreement, and the Colorado Court is required to give full faith and credit to such Findings of Fact, Judgment and Decree.

3. The Colorado Court, in ruling that the Respondent, either by way of so-called damages or further property division, is entitled to an additional portion of the property of

the Dickey Estate, has failed to give full faith and credit to the findings and judgment of the Kansas Court and has deprived Petitioners of the constitutional protection to which they are entitled under the full faith and credit provision of Section 1, Article IV, of the Federal Constitution.

ARGUMENT

I

Certiorari Is the Proper Procedure to Test a Question Involving Denial By State Courts of Full Faith and Credit to Judicial Proceedings of Other States

This has just been held by this Court in *Union National Bank of Wichita, Kansas, v. Carl C. Lamb,* decided May 16, 1949, (No. 500) reported in 337 U. S. 38, 93 L. Ed. 888 (Adv. Op.).

II

Under the Full Faith and Credit Provision of Article IV of the Federal Constitution, the Courts of One State Must Give the Same Recognition and Force to the Judicial Proceedings of the Courts of Other States as the Courts of Such Other States Give to Their Own Judicial Proceedings

This, we believe, is a well recognized principle requiring no extensive citation. *Milliken v. Meyer,* 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278; *Roche v. McDonald,* 275 U. S. 449, 48 S. Ct. 142, 72 L. Ed. 365; *Titus v. Wallick,* 306 U. S. 282, 59 S. Ct. 557, 83 L. Ed. 653; *Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 888 (Adv. Op.).

We quote, briefly, from *Milliken v. Meyer,* supra, which was a case where the Colorado Supreme Court failed to follow this principle until directed to do so by this Court, wherein in the Opinion of Mr. Justice Douglas it is stated:

> "Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is of course open to inquiry. (citing cases) But if the judgment on its face appears to be a 'record of a court of general juris-

diction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.' Adam v. Saenger, supra (303 US at p. 62, 82 L. ed. 651, 58 S. Ct. 454). In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. * * *." (85 L. Ed. 282, 283)

III

Clearly the Findings and Decree of the Colorado District Court, as Affirmed by the Colorado Supreme Court, are Contrary to the Findings of Fact, Judgment and Decree of the Kansas Court

This statement, we believe, cannot be refuted.

It cannot be contended that the divorce and property division action brought by Mrs. Dickey against Mr. Dickey in the Kansas Court was not a part of the "judicial proceedings" of the State of Kansas. In connection with this particular "judicial proceeding" of the State of Kansas, the State District Court of Sedgwick County, clearly having jurisdiction of the parties and of the subject matter, found (a) that the February 7, 1944, property settlement agreement between Mr. and Mrs. Dickey had been submitted to that Court, for consideration by the Court, (b) that that Court was "duly advised in the premises", (c) that under the circumstances the property settlement agreement was a fair and equitable division of the property accumulated by Mr. and Mrs. Dickey during their marriage period and (d) that the same should be approved by the Court (R., p. 10).

Based upon these findings, the Kansas Court adjudged and decreed (1) that the property settlement agreement was approved, (2) that the division of property and the settlement of the mutual rights of Mr. and Mrs. Dickey, as evidenced by the property settlement agreement, was reasonable and equitable under all the circumstances (R., p. 13) and (3)

the Court then further ordered and decreed that both Mr. and Mrs. Dickey were permanently and perpetually enjoined from claiming or asserting any right, title or interest in and to the property of the other as the same was established by the property settlement agreement (R., p. 16).

The Colorado District Court, affirmed by the Colorado Supreme Court, after holding that there was no actual fraud, duress or coercion connected with the execution of the property settlement agreement, finds, contrary to the finding of the Kansas Court, that the property settlement agreement was not fair and equitable. This finding was based upon the view and holding of the Colorado Court that a division of property between husband and wife which gives the wife only $325,000 in cash, plus miscellaneous assets, out of a total jointly accumulated property of the value of anywhere between two and a half million dollars and five and six million dollars is not fair and equitable.

Basing its conclusion upon this finding, the Colorado Court then found that, as a matter of law, Mr. Dickey was guilty of so-called extrinsic fraud, although not guilty of fraud, duress or coercion in fact, and that, because of this so-called extrinsic fraud, Mrs. Dickey was entitled to further relief.

This relief was sought in the complaint under the guise of damages based upon actual fraud. That actual fraud was expressly found not to exist. The Colorado State District Court, however, held that the former Mrs. Dickey (now Mrs. Bartges) was entitled to receive an additional $450.00 per month out of the Dickey Estate assets through a trust to be created by the Executors. This obviously is not a judgment for damages in an action at law such as framed by the complaint, but is a further division out of what the Court found to be the accumulated assets of the marital relationship.

The Colorado Supreme Court affirmed everything the

Trial Court did, with the exception of limiting the relief to a trust out of which Mrs. Bartges will secure the additional $450.00 per month. As appears from the Colorado Supreme Court Judgment, coupled with that Court's Opinion, the State District Court is directed now to enter a money judgment, rather than to enter a judgment for the creation of a trust, in such amount "as will result in a fair and equitable division of property as required under the Kansas law" (page 16, supra).

It seems clear that the judgment required to be entered by the Colorado State District Court pursuant to judgment of the Colorado Supreme Court is only a conversion of a judgment for the creation of a trust into an equivalent judgment for money, which will result in what the Colorado Court finds is a fair and equitable division of the property as required by the Kansas law. Such a judgment can only be a re-adjudication of the question as to whether the property settlement agreement, held and adjudicated by the Kansas Court as being fair and equitable, is fair and equitable.

It is impossible, as we see it, for the Colorado Court, actual fraud, duress and coercion being eliminated from the case through the Findings and Decree of the Colorado District Court, to consider or adjudicate the question as to whether the property settlement agreement between Mr. and Mrs. Dickey was fair and equitable (a) without reconsidering and re-deciding a question which has been found as a matter of fact and adjudicated as a matter of law by the Kansas Court, (b) without violating the injunction contained in the Kansas Court decree enjoining both Mr. and Mrs. Dickey from thereafter claiming any additional right, title or interest in the property of the other inconsistent with the property settlement agreement, (c) without making findings of fact and an adjudication contrary to the findings of fact and the adjudication made by the Kansas Court and (d) without permitting Mrs. Bartges to maintain an action in the Colorado Court in violation of the injunctive provision of the Kansas Court.

It is a subterfuge, as we see it, to call any judgment which may be entered in this case a "judgment for damages". The action was brought as an action at law to recover damages based upon actual fraud alleged to have induced the execution of the property settlement agreement. It was found that there was no such fraud, which certainly destroyed any right to a judgment for damages based upon fraud. Any relief which can now be granted and the relief which has been granted, call it anything else, cannot be anything more or less than a further division of property as between Mr. and Mrs. Dickey.

The Colorado Court, as we see it, has simply found and held that the Kansas Court was wrong in finding as a matter of fact and adjudicating as a matter of law that the property settlement agreement was a fair and equitable division of the property of Mr. and Mrs. Dickey and in decreeing that each of them should be enjoined from claiming any right to the property of the other contrary to the settlement agreement.

IV

The Judgment and Decree of the Kansas Court, Including the Findings of Fact Upon Which Such Judgment and Decree is Based, is Res Judicata Under the Kansas Laws and Decisions and Must Be Given the Same Res Judicata Effect in Colorado in Order to Meet the Requirements of the Full Faith and Credit Provision of Article IV of the Federal Constitution

Admittedly, by all the authorities, in order to comply with the full faith and credit requirements of the Federal Constitution, the Courts of one State must give the same credit and effect, no more and no less, to the judicial proceedings of the Courts of another State as are given by the Courts of the State in which such judicial proceedings are conducted.

With this principle in mind, these Petitioners contended in the Colorado Courts that these Courts had failed to give full faith and credit to the Findings, Judgment and Decree of the Kansas Court because:

1. The property settlement agreement dated February 7, 1944, was a part of the February 7, 1944, Kansas divorce judgment and decree and, therefore, because of such incorporation, its binding effect had been adjudicated by the Kansas Court.

2. That, irrespective of whether or not the property settlement agreement was a part of the Kansas Court judgment and decree, that judgment and decree contained findings and a decree to the effect that the property settlement evidenced by the property settlement agreement was fair and equitable, which findings and decree must necessarily be recognized by the Colorado Courts under the Federal Constitution. We furthermore urged that the Kansas Court, which concededly had jurisdiction of the parties involved in that action, had in its decree enjoined the parties thereto from subsequently, in any other proceeding, asserting a right in the property of the other inconsistent with the property settlement agreement and that the Colorado proceeding necessarily had the effect of violating that injunctive provision.

3. We pointed out in the Colorado Courts and point out here that the Findings of Fact, Judgment and Decree made and entered by the Kansas Court was made and entered by and with the approval and consent of both Mr. and Mrs. Dickey, through their respective attorneys, which approval and consent is evidenced by their endorsement on the findings of fact and decree as entered by the Trial Court and that, under Kansas law, such a consent decree, even though, arguendo, the Court entering it had no jurisdiction of the subject matter, is res judicata with the same force and effect as if that Court had had such jurisdiction.

It is Petitioners' contention that, under the Kansas law,

the Respondent herein would not have the right to maintain the action in Kansas which she has instituted in the Colorado Courts or to secure the relief which the Colorado Courts have granted her in this action, and that the Colorado Courts, in permitting her to maintain this action and in giving her the relief which they have done, have denied full faith and credit to the Kansas judicial proceedings, in violation of the Federal Constitution.

In the next several subdivisions we will amplify these various points.

V

The Kansas Court Has Found and Decreed the Property Division Evidenced by the Property Settlement Agreement to Be Fair and Equitable in a Manner Binding Upon the Colorado Courts Under the Federal Constitution Even Though the Property Settlement Agreement Be Held Not to Be a Part of the Kansas Court Decree

In the proceedings below Petitioners contended that the question of property division between Mr. and Mrs. Dickey was res judicata under the Kansas law and, hence, res judicata under the Colorado law by proper application of the full faith and credit provision of the Federal Constitution. Among the grounds upon which this contention was based were (a) that the property settlement agreement should be considered as an express part of the Kansas decree, (b) that, even though the property settlement agreement should not be considered as an express part of and incorporated in the Kansas decree, nevertheless, the Kansas Court had made a specific finding, based upon its consideration of the property settlement agreement, that that property settlement agreement was fair and equitable and (c) that, consistent with this finding, the Court had so decreed and had further enjoined the parties from attempting to assert any right in the property of the other inconsistent with the property settlement agreement.

This question was presented to the Colorado Supreme Court, as well as to the State District Court below. The State District Court ignored the question entirely. The Colo-

rado Supreme Court, as shown by its Opinion (R., p. 420), as its entire reason for denying the constitutional question presented, held that the property division was not adjudicated by the Kansas Court because of the fact that the property settlement agreement was not incorporated in the decree itself. This holding was made because the Colorado Court found there was no Kansas Supreme Court decision, in the Colorado Court's opinion, sufficiently definite to determine that under the Kansas law the property settlement agreement would be considered a part of the decree unless actually incorporated therein. It then pointed out that, under the decisions of the Colorado Supreme Court, under similar circumstances, in connection with a divorce action brought in a Colorado Court, a property settlement agreement is not considered a part of the divorce decree unless actually incorporated therein and set forth therein at length. It further held that, in the absence of being convinced as to what the law was in this respect in Kansas, it should assume that the Kansas law on "common law" principles was the same as the Colorado law and, hence, it concluded that the property settlement agreement itself could not be considered as being a part of the Kansas decree. This holding was based upon the somewhat familiar principle that, in the absence of evidence to the contrary, the "common law" of one State is assumed to be the same as the "common law" of the other State, and the application of this principle is made, notwithstanding the fact that at "common law" there is no such thing as our present form of divorce action and property division. Notwithstanding the reasoning of the Colorado Supreme Court, it still remains that under the Kansas law, as we see it, the Kansas decree is res judicata on the question of what constitutes a proper property division as between Mr. and Mrs. Dickey. Even though the property settlement was not incorporated in the Kansas decree, nevertheless, it is true the Court specifically found, after consideration of that property settlement agreement, that the property division evidenced thereby was fair and equitable, and it then so decreed. It

not only made this finding and decree, but it followed it up by its injunctive order directed to the parties, over which it admittedly had jurisdiction, enjoining them from doing just exactly what they are doing in this Colorado proceeding, namely, asserting a further right in the property of the other inconsistent with the property settlement agreement and inconsistent with that decree.

Starting with the premise that, in order to comply with the full faith and credit provision of the Federal Constitution, the Colorado Court must give the same faith and credit to the Kansas judgment as the Kansas Courts themselves would give, we now call attention to a decision of the Kansas Supreme Court (which was called to the attention of the Colorado Supreme Court—R., p. 487). The case to which we specifically refer is *Petty v. Petty*, decided by the Kansas Supreme Court on June 11, 1949, and now reported in 207 P. (2d) 428, 167 Kan. 510. This case affirmed the contention that Petitioners consistently made in the Colorado Courts that, if the Court made specific findings followed by decree and judgment with reference to property division, the findings, judgment and decree was binding and res judicata, even though the property settlement agreement was not set forth at length in the findings and decree. In other words, there is a clear distinction between a situation where a property division agreement is merely "approved" by the divorce court and a situation where, in addition to the "approval", the Court makes direct findings, followed by judgment and decree, as to the sufficiency of the property division. In the one case a mere "approval" may not be held to constitute a finding or a decree as to whether the property division evidenced by the approved instrument is fair and equitable, whereas, in the other case, if the Court goes into the question and, in addition to merely approving an instrument not a part of the decree, it finds, after consideration of that instrument that, under the circumstances submitted, the property division evidenced by that agreement is fair and equi-

table and so decrees, and then enjoins the parties from asserting contrary claims, such findings and decree is a part of the judicial proceedings of that Court and entitled to full faith and credit under the Federal Constitution. In the case of *Petty v. Petty*, above referred to, the Kansas Supreme Court indicated that a "mere approval" of a property division agreement might not make the property division agreement a part of the decree, but it further held that, even though the property division agreement was not incorporated at length in the decree, if the Court made a finding of its own, as distinguished from mere approval as to what someone else did, and then entered a decree in accordance with its own finding as to the fairness and reasonableness of the property division agreement, those findings and the corresponding decree is, in fact, a part of the decree and res judicata as to the property division in the subsequent proceeding.

We quote from the *Petty* case:

> "There may be jurisdictions (some are cited by appellee) where incorporation of the contract in the decree by making it a part thereof places it in the status of a judgment or court order so that it can be enforced only as the judgment of the court. Such a rule does not tend to encourage the solution of marital difficulties by contract rather than by recourse to the courts. The tendency in this state has been for the courts to approve and carry out agreements of the parties where they have made a comprehensive contract which is fair and reasonable in its terms. Perkins v. Perkins, 154 Kan. 73, 114 P. 2d 804.
>
> "To adopt the rule urged by appellee, and to say the district court of Saline county cancelled the separation agreement and incorporated or 'merged' it into a court order of judgment by merely attaching it as an exhibit and making it a part thereof, would not be consistent with encouraging the solution of marital

difficulties by the parties themselves. When it is expedient that such contracts be consolidated with or incorporated or 'merged' in the judgment, as urged here by appellee, the courts must accomplish that purpose by positive and intentional language. The district court of Saline county did not do so in its order of judgment of May 23, 1938.

"For example, in Hullet v. Hullet, 133 Kan. 738, 3 P. 2d 470, an antenuptial contract was said to have been 'merged' in the judgment. But there the contract divided real property between the parties and the decree of judgment provided:

" ' • • • and which said contract the court finds makes a fair and equitable division of property as between plaintiff and defendant; and said contract is approved and confirmed, and each of the parties hereto is ordered and adjudged full ownership and title in the property as agreed in said contract.' 133 Kan. loc. cit. 740, 3 P. 2d loc. cit. 471.

"By such order the court clearly spelled out the terms of the contract in its judgment decree. The decree left the parties in the same place as would have the terms of the contract in the absence of a decree."

In the *Hullet* case the Kansas divorce court made a finding that the property division contract was a fair and equitable division of the property, in addition to approving and confirming the property division agreement. The parties to the action were ordered and adjudged full ownership and title as agreed to in the contract. This is substantially what appears in the Kansas divorce decree in the present case. In that decree between Mr. and Mrs. Dickey the Court found (R., p. 10):

"Thereupon, it was announced to the court that the parties hereto had reached an amicable settlement

concerning their property and property rights, which property settlement was by the parties submitted to the court for consideration of the court, and the court, being duly advised in the premises, finds that said property settlement, under the circumstances, is a fair and equitable division of the properties accumulated by the parties during said marriage and that the same should be approved by the court."

Again in the decree the Court decreed (R., p. 13):

"Second: That the property settlement made between the parties hereto be, and the same is hereby, approved by the court, and that said division of property and the settlement of their mutual rights is fair, reasonable and equitable under all the circumstances, and that the court makes no order for the payment of any alimony to the plaintiff in this case."

And finally the Kansas Court enjoined Mr. and Mrs. Dickey in the following language (R., p. 16):

"Seventh: It is further ordered by the court that each of the parties hereto be, and they each are hereby, permanently and perpetually enjoined from claiming or asserting any right, title or interest in and to the property of the other as the same is established by the property settlement of the parties, or in and to any property which either party may hereafter acquire by purchase, gift, descent, or otherwise."

There has been more than a mere approval of the property settlement agreement entered into by Mr. and Mrs. Dickey. There has been a finding and decree by the Kansas Court that that property division is fair and equitable. There is an injunctive order in support of that finding and decree. We submit this *Petty* case directly supports and conclusively establishes the res judicata defense and point submitted by Petitioners.

VI

The Kansas Decree Was a "Consent Decree" and is, Therefore, Res Judicata and Binding Upon the Parties Consenting Thereto Irrespective of Any Question as to the Basic Jurisdiction of the Kansas Court Entering Such Decree

As the Statement, supra, shows, the complaint filed in the Kansas Court by Mrs. Dickey prayed for both divorce and property division, and thereafter, at the time of the trial, the property settlement agreement entered into between Mr. and Mrs. Dickey was submitted to the Court, for consideration by the Court, and, based upon that submission and consideration and the evidence introduced, the Court made its findings of fact and its decree hereinabove referred to. The findings of fact and the decree was approved by and consented to by Mr. and Mrs. Dickey, through their respective attorneys, as appears from their endorsement thereon shown at page 17 of the Record. The Colorado Supreme Court itself (R., p. 424) refers to the Kansas decree as a consent or stipulated decree in so far as the property division is concerned.

It is the law of Kansas, as it is indeed elsewhere, that any party litigant who consents to a particular decree is barred and estopped from thereafter attacking that decree or questioning the power or jurisdiction of the Court to enter it, and such a consent decree is res judicata in Kansas and, consequently, must be res judicata in Colorado if compliance is to be had with the full faith and credit provision of the Federal Constitution.

In *Cowle v. Cowle,* 114 Kan. 605, 220 P. 211, it was contended that a portion of a divorce decree incorporated in the decree by the consent of the parties under which the Court set off certain property to the children of the parties, rather than to the wife, was not binding because not within the jurisdiction of the Court. The Kansas Supreme Court, however, overruled this contention, holding the decree to be binding and enforceable by the children. The concluding paragraph of the Opinion reads as follows:

> "That it is evidenced by a decree of a court of record is, of course, no objection to the agreement. That the parties could have accomplished the same disposition of their property by proper instruments executed by them and recorded no one doubts. There is no just reason why they could not accomplish the same purpose by an agreement which they caused to be entered in a decree of a court of record, in a suit to which they were parties. The cause will be reversed, with direction to enter judgment for the minors."

In *Baldwin v. Baldwin,* 150 Kan. 807, 96 P. (2d) 614, it was contended that a partition decree was void and not binding because it went beyond the issues of the case in effecting a modification of an ante-nuptial agreement, but it further appeared that the partition decree was entered by consent of the parties. The Kansas Supreme Court again held that this consent decree was binding, notwithstanding that it went beyond the issues of the case. We quote at considerable length from this case (Page 617, Pacific Reporter):

> "The fact that there was a partition suit pending did not destroy the capacity of the parties to contract. They were competent to make the agreement and the decree of the court recognized and ratified the agreement. That such consent decrees are binding upon the parties has long been established. (34 C. J. 129 et seq.; 15 R.C.L. 643-646). The general rule has been followed by this court in upholding such judgments. In the early case of *Union Pac. Ry. Co. v. McCarty,* 8 Kan. 125, the binding effect of a previous decree entered upon consent of the parties was recognized. In an action in 1862 to condemn defendant's land for right of way, judgment had been entered which provided not only for a money payment to the defendant but further provided that the plaintiff was to fence his land. The company did not build the fence, and four years later McCarty brought action to recover damages and was permitted to introduce the record of the former judg-

ment. The company claimed that the court had no power to render the former decree and that it was void. The court said that question might have been raised on review of the judgment in the former case, but that the record showed that the judgment had been entered by consent of the parties and was binding upon them.

"In the case of *Schermerhorn v. Mahaffie,* 34 Kan. 108, 8 P. 199, a former consent decree was upheld. The former action involved, inter alia, partition of real estate. In the later action it was claimed that the decree theretofore made dividing the property was void because it was not in accordance with the allegations and claims made in the petition and for other reasons. The court said that while the former decree was probably erroneous in some particulars, no fraud was shown and refused to set aside the 'consent decree.'

"*Cowle v. Cowle,* 114 Kan. 605, 220 P. 211, involved a decree entered upon consent of husband and wife that certain real property in the husband's name should be set off to children who were not parties to the action. Although the court would probably have had no jurisdiction to render such decree had it not been agreed upon *(Melton v. Every,* 105 Kan. 255, 182 P. 543), the decree was sustained as a consent decree.

"In *Hyde v. Hyde,* 143 Kan. 660, 56 P. 2d 437, a consent decree providing for support of a child had been rendered in a divorce action. Later a separate action for specific performance of the provisions of the decree was brought. Stipulations of the parties modifying the original agreement in some respects were filed and again a decree was entered in harmony with the modifications. About two years later the defendant filed a motion to modify the previous order, which motion was resisted. The court refused to modify, holding in effect that the parties had entered into a contract and that the decree entered in harmony

with their agreement and by their consent, was binding, and that the decree should be enforced until modified in the method provided for in the decree itself.

"The cases cited by appellant have been examined. They are distinguished from the instant case because it does not appear in any of them that the decree set aside had been entered upon consent of the parties.

"For reasons stated the defendant was bound by the judgments of January 18, 1936 and February 3, 1936. No appeal was taken from those judgments. The judgments made the $300 due from the defendant a lien upon the quarter section allotted to him and cannot be disturbed in this action."

We quote briefly from *Brooks v. National Bank of Topeka,* 153 Kan. 831, 113 P. (2d) 1069, 1074:

"* * * We regard the judgment complained of to have been rendered by consent, which estops the party consenting to its rendition from hereafter objecting to its validity * * *."

This Court has recognized the applicability of and applied the full faith and credit provision of the Federal Constitution to "consent" judgments where such judgments are held to be res judicata in the States where rendered. *Schlosser v. Hemphill,* 198 U. S. 173, 49 L. Ed. 1000; *Bates v. Bodie,* 245 U. S. 520, 62 L. Ed. 444.

VII

The Only Fraud Found to Exist By the Colorado Court Is So-called "Extrinsic Fraud". No "Extrinsic Fraud" Appears From the Record and Escape From Compliance With the Full Faith and Credit Requirements of the Federal Constitution Cannot Be Justified on the Theory of Extrinsic Fraud.

As found by the Trial Court, which is not reversed by the Colorado Supreme Court, Mr. Dickey was not guilty of actual fraud, duress or coercion in connection with the property settlement agreement. The basis of relief relied upon

by the Trial Court, as expressly set forth in the Trial Court's findings, is as follows (R., p. 83):

> "Sixth: That George P. Dickey recognized that his wife was entitled to an adequate income for life, as is attested by his entering into the settlement agreement. But being a man worth at least two and a half million, knowing that his wife had no independent estate, that she was relinquishing all right to an already established trust of $250,000.00, and considering his wealth after twenty years of married life, to allow her $550.00 per month stamps the agreement as being inadequate and unfair and he was, *therefore,* guilty of extrinsic fraud in entering into such an agreement." (emphasis supplied).

It is absolutely clear, we submit, that the "extrinsic fraud" so found to exist by the Trial Court was solely based on the amount of the property division secured by the then Mrs. Dickey which the Kansas Court found and decreed to be fair and equitable. It is obvious that what the Trial Court did, after finding that there was no actual fraud, duress or coercion, was to substitute its judgment for the findings and judgment of the Kansas Court that the property division was fair and equitable. The Trial Court simply concluded that the former Mrs. Dickey should have more of the Dickey Estate property, the Kansas judgment to the contrary notwithstanding, and proceeded to give her more, with so-called "extrinsic fraud" as the basis or justification.

The Colorado Supreme Court in its Opinion (R., p. 439) approved the Trial Court's finding that the property settlement agreement was "inadequate and unfair", although also affirming the Trial Court's finding that there was no actual fraud, duress or coercion, and then likewise concluded, as did the Trial Court, that this inadequacy and unfairness made Dickey guilty of "extrinsic fraud".

There is no finding of any kind in the entire Record which brings Mr. Dickey's participation in the property settlement agreement within any accepted definition of extrinsic fraud.

As repeatedly pointed out, actual fraud, duress and coercion are eliminated from the case through the findings of the Trial Court, so the only other fraud to be considered is "extrinsic fraud".

The term "extrinsic fraud" has been defined by the Kansas Supreme Court in a number of cases. We quote briefly but from one case.

Electric Plaster Co. v. Blue Rapids City Tp., 81 Kan. 730, 106 P. 1079, 1081:

> " • • • . By the expression 'extrinsic or collateral fraud' is meant some act or conduct of the prevailing party which has prevented a fair submission of the controversy. Among these are the keeping of the defeated party away from court by false promises of a compromise, or fraudulently keeping him in ignorance of the action. Another instance is where an attorney without authority pretends to represent a party, and corruptly connives at his defeat, or where an attorney has been regularly employed, and corruptly sells out his client's interest. The fraud in such a case is extrinsic or collateral to the question determined by the court. • • • "

This definition is followed and applied in numerous other Kansas Supreme Court cases, including *Potts v. West,* 124 Kan. 815, 262 P. 569; *Putnam v. Putnam,* 126 Kan. 479, 268 P. 797; *Eaton v. Koontz,* 138 Kan. 267, 25 P. (2d) 351; *McNergney v. Harrison,* 148 Kan. 843, 84 P. (2d) 944; *Laidler v. Peterson,* 150 Kan. 306, 92 P. (2d) 18.

The Colorado Supreme Court itself has heretofore defined "extrinsic fraud" in substantially the same manner as the Kansas Court.

We quote from *Bullis v. The First National Bank of Idaho Springs, Colorado,* 40 Colo. 253, 258, 90 P. 634:

> "Fraud which will vitiate a judgment must relate to extrinsic or collateral matters and not to issues involved in the case in which the judgment was rendered;

that is to say, the fraud in such case must be fraud in *procuring* the judgment, and not fraud in the account upon which the cause of action is instituted, because judgments are not impeachable for frauds relating to the merits between the parties.—*Venner v. Denver Union Water Co., ante*, p. 212; Black on Judgments, sec. 370; Freeman on Judgments, sec. 489."

Mr. Dickey, as found by the Colorado Court, was not guilty of fraud, duress or coercion. The Record is devoid of anything which would indicate that Mr. Dickey was guilty of any action which would constitute extrinsic fraud. His participation in the Kansas proceedings would not constitute extrinsic or any other kind of fraud under the Kansas law and the Kansas judgment would not under the Kansas law be subject to attack on the ground of extrinsic fraud, but would be res judicata as against such attack.

As heretofore stated, the judgment rendered in favor of the Respondent (Mrs. Bartges) by the Colorado Court is based solely upon the announced theory of law that the Colorado Court is not bound to give full faith and credit to a Kansas judgment, which is free from fraud, duress or coercion, actual, extrinsic or otherwise, where the Colorado Court feels that the Kansas Court did not give the wife a proper amount of the husband's property. This theory, we submit, cannot find support in law and must necessarily result in the denial to the Kansas judgment and to Petitioners of the full faith and credit protection to which it and they are entitled under the Federal Constitution.

VIII

The Ultimate Conclusions of Law Announced by the Colorado Courts are Startling and Revolutionary

As analyzed by us in syllabus form, the controlling law as announced by the Colorado Supreme Court in its Opinion is as follows:

Where a separated husband and wife, each represented by competent legal counsel, during the pendency

of a divorce and property division case in Kansas to which they were parties, entered into a property division agreement, which, upon consideration by the Kansas Court and with the consent of the parties, was found and decreed to be fair and equitable and to attack which the parties, with their consent, were enjoined by that Court, the former wife can, notwithstanding the decree of the Kansas Court, in an independent suit brought in Colorado, where personal service is obtained, secure an additional amount of the husband's property upon the sole ground of so-called "extrinsic fraud" found to exist because, as concluded by the Colorado Court, the amount received by the wife was not a fair division when considered in the light of the husband's wealth, and this, notwithstanding the express finding of the Colorado Court that the property division was made without fraud, duress or coercion.

The above is the holding of the Colorado Supreme Court, notwithstanding the full faith and credit provision of the Federal Constitution. We have here a case where there was a divorce and property division action in Kansas. There was a property settlement agreement in Kansas. There was a decree entered by the Kansas Court of admittedly competent jurisdiction which found that the property division evidenced by the property settlement agreement was fair and equitable, and which so decreed, and which enjoined the parties from asserting any rights in the property of the other contrary to the settlement agreement. Notwithstanding this, some nineteen months after all this happened, the former wife institutes suit in Colorado in the ostensible form of an action at law for "damages" in which she claims that she is entitled to more of the property of her former husband's estate and is sustained in her claim in the Colorado action notwithstanding the specific finding of the Colorado Court that the property settlement agreement was not induced by any actual fraud, duress or coercion and upon the sole ground that the property division as between the husband and the wife was unfair and inequitable in view of the hus-

band's wealth. If this Kansas proceeding is not binding on the Colorado Court, then we cannot help but wonder whether the Colorado Court judgment is binding or whether there can be any end to this property division question. If the Colorado judgment can and shall be sustained, then it may well be that the former Mrs. Dickey can, after she wins or loses in the Colorado Court, start some other proceeding in Arizona, where she is now a resident, seeking relief and an additional part of the Dickey Estate property over and above what she secured under the Kansas proceedings and what she may secure, or will not secure, under the Colorado proceedings. This emphasizes the purpose of and the necessity of applying the full faith and credit provision of the Federal Constitution which is presented to this Court for its consideration.

IX

The Federal Question Raised Throughout This Case

As we have pointed out in the Statement, supra, Petitioners' defense, based upon the full faith and credit provision of Article IV of the Federal Constitution, was raised from the very beginning of this case in the Colorado State District Court and throughout its meanderings in the Colorado Supreme Court. It was raised in the answer filed by Petitioners to the complaint (R., p. 59). It was raised in the Petitioners' Specification of Points filed in the Supreme Court (R., p. 411). It was raised in the petition for rehearing (R., pp. 470, 482).

X

The Finality of the Judgment to Which This Petition Is Directed

We, of course, are cognizant of the principle that certiorari will only be granted to final judgments. In this instance the Colorado District Court entered a judgment against Petitioners requiring Petitioners to create a trust fund out of the Dickey Estate assets in an amount sufficient to pay Mrs. Bartges $450.00 per month for life, with remainder of the trust fund, if any, to go to the trusts of her two children. This judgment was based upon the unwarranted conclusion

that the property settlement agreement theretofore entered into between her and her then husband was not fair and equitable and said judgment was entered for the stated purpose of making the property division fair and equitable. The Colorado Supreme Court has sustained everything the Trial Court did, with one exception. It has held that the additional amount to which Mrs. Bartges is now entitled should not be tied up in a trust, but should be paid to her outright in the form of a money judgment. Both the State Trial Court and the State Supreme Court have granted this relief (although the same relief was granted in different form in each Court), notwithstanding the defense presented that any relief would violate the full faith and credit provision of the Federal Constitution.

It is clear that the constitutional question raised has been definitely and permanently decided by the Colorado State Courts and that, whatever the District Court may do pursuant to the remand from the Colorado Supreme Court, no further Federal constitutional question related to the full faith and credit provision of Article IV of the Federal Constitution can be involved.

A pure ministerial duty, that is, the duty to mathematically compute the amount to be paid the Respondent, would seem to remain in the District Court—the duty to enter a money judgment against Petitioners in favor of Respondent rather than a judgment to create a trust fund.

The rights and liabilities of the parties to this action have become fixed, which is, as we understand it, the real test of finality. If this proceeding should be permitted to go back to the Trial Court and it should enter a judgment pursuant to the Supreme Court mandate and that judgment should again be taken to the Colorado Supreme Court, no new constitutional question relating to the full faith and credit provision of the Federal Constitution could be raised. That question has already been raised in and decided by the

Colorado Supreme Court. We believe it would serve no useful purpose to attempt here to analyze the numerous decisions of this Court and other Courts relating to the question of finality of judgments to which appeals or writs of certiorari may properly be directed. We are not unmindful of the very recent decision of this Court in *Republic Natural Gas Co. v. State of Oklahoma*, 334 U. S. 62, 92 L. Ed. 1212, and submit that within the reasoning of the language of that opinion the Colorado Supreme Court judgment in this case has that character of finality to which a petition for writ of certiorari can properly be directed and a writ granted.

We also call the Court's attention to the fact that the judgment of the Colorado Supreme Court is positive and final as to the imposition of costs against Petitioners. The Trial Court has no discretion to exercise or function to perform with reference to the judgment for costs, except to enter. This in itself, we submit, imparts the necessary finality to this judgment to support certiorari if, on any theory, the other part of the judgment might not be considered to do so. We have in mind the opinion of this Court, through Mr. Chief Justice Taft, in *Newton v. Consolidated Gas Company of New York*, 265 U. S. 78,68 L. Ed. 909, from which we merely quote paragraph 2 of the Syllabus:

> "2. A decree taxing costs is final within the rule as to the taking of appeals."

The Findings, Judgment and Decree of the Kansas Court is entitled to protection under the full faith and credit provision of Section 1, Article IV, of the Federal Constitution, for the reasons above advanced, which protection has been denied by the Colorado Courts, and it is, therefore, respect-

fully submitted that the Writ of Certiorari here applied for should be granted.

Respectfully submitted,

KARL F. CRASS,
Equitable Building,
Denver, Colorado;

JOHN P. AKOLT, JR.,
R. A. DICK,
JOHN P. AKOLT,
1300 Telephone Building,
Denver, Colorado,
Attorneys for Petitioners.

AKOLT, CAMPBELL, TURNQUIST & SHEPHERD,
1300 Telephone Building,
Denver, Colorado,

Of Counsel.

December, 1949.

CITATIONS.

	PAGE
Boyles v. Emery, 159 Kan. 300, 153 P. (2d) 936	14
Calkins v. Calkins, 155 Kan. 43, 122 P. (2d) 750	14
Elliott v. Elliott, 154 Kan. 145, 114 P. (2d) 823	14
Fusselman v. Fusselman, 122 Kan. 515, 253 P. 411	14
Heivly v. Miller, 102 Kan. 313, 169 P. 1141	14
Hullet v. Hullet, 133 Kan. 738, 3 P. (2d) 470	12
Hyde v. Hyde, 143 Kan. 660, 56 P. (2d) 437; Id., 147 Kan. 134, 75 P. (2d) 1023	10
Mayfield v. Gray, 138 Kan. 156, 23 P. (2d) 498	14
McCormick v. McCormick, 82 Kan. 31, 107 P. 546	14
Petty v. Petty, 147 Kan. 342, 76 P. (2d) 850	10
Petty v. Petty, 207 P. (2d) 428, 167 Kan. 510	12
Pinkerton v. Pinkerton, 122 Kan. 131, 251 P. 416	14
Putnam v. Putnam, 104 Kan. 47, 177 P. 838	14
Raney v. Matney, 128 Kan. 426, 278 P. 26	14
Republic Natural Gas Co. v. State of Oklahoma, 334 U. S. 62, 92 L. Ed. 1212	19
Roberts v. Fagan, 76 Kan. 536, 92 P. 559	14
Roe v. Roe, 52 Kan. 724, 35 P. 808	14
Zellner v. Zellner, 155 Kan. 530, 127 P. (2d) 428	14

INDEX.

PAGE

Comment on the "Statement of the Case" in the opposing brief 1

Argument 7

I. The Nature of the Proceedings and Judgment in the Colorado Courts 7

II. The Nature of the Proceedings in and Findings of Fact and Decree of the Kansas Court 10

III. Full Faith and Credit Has Been Denied 15

IV. The Finality of the Judgment 18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949.

No. 504.

UNITED STATES NATIONAL BANK OF DENVER and HILDRED J. DUNGAN, as Executors of the Estate of George P. Dickey, Deceased, PETITIONERS,

v.

RUBY DICKEY BARTGES, RESPONDENT.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this short brief in reply to the brief in opposition filed in behalf of the Respondent.

COMMENT ON THE "STATEMENT OF THE CASE" IN THE OPPOSING BRIEF

The petition for certiorari clearly presents to this Court a question of law only as to whether the judgment of the Colorado Court fails to give full faith and credit to the findings of fact and the decree of the Kansas Court as required by the Federal Constitution.

The Colorado Trial Court, after considering the voluminous evidence now condensed in the more than 400-page printed Record, found that there was no fraud or duress on the part of Mr. Dickey in connection with the property settlement agreement, but further found, notwithstanding that agreement and notwithstanding the findings of fact and decree of the Kansas Court, that Mrs. Bartges, the former Mrs. Dickey, was entitled to more of the Dickey Estate property than she received under the property settlement agreement solely because, in the Colorado Court's opinion, the amount she received under the property settlement agreement was inequitable in the light of Mr. Dickey's wealth. The Respondent, by her cross-specifications filed in the Colorado Supreme Court (R., pp. 417-420), sought to have the Colorado Supreme Court reverse the Trial Court's findings that there was no fraud or duress in connection with the property settlement agreement, but this the Colorado Supreme Court refused to do and, on the other hand, affirmed the Trial Court's findings and decree with the sole exception that it directed a money judgment to be entered in favor of the Respondent rather than the creation of a new trust such as had been ordered created in the Trial Court's decree.

This being the situation, it is obvious that the evidence upon which the Colorado Trial Court found that there was no fraud or duress on the part of Mr. Dickey is irrelevant and immaterial to the question now presented to this Court as to whether the judgment of the Trial Court, notwithstanding the finding of the Trial Court, affirmed by the Colorado Supreme Court, that there was no fraud or duress, violates the full faith and credit provision of the Federal Constitution.

For some reason, however, opposing counsel have thought it necessary or proper to refer to selected bits of the evidence in the voluminous Record which could only have a bearing upon the factual question of fraud, which has been adversely decided against Respondent, and which is not

before this Court, except as to the nonexistence of any such fraud, and can have no possible relevancy to the full faith and credit question now presented to this Court. In justice to the cause of the Executors of the Dickey Estate and the beneficiaries of that Estate, as well as to Mr. Dickey himself, we cannot accept the underlying picture sought to be presented by opposing counsel without a word of refutation, particularly in view of the findings of the Colorado Court that there was no fraud or duress on the part of Mr. Dickey in connection with the property settlement agreement.

On page 2 of their brief opposing counsel quote or refer to evidence that back in 1926, when the first child of Mr. and Mrs. Dickey was born, he was unable to discharge the medical and hospital bills, and that in the Spring of 1927 friends took up a collection for him to pay his gas, water and light bills and to buy some food, and that Mrs. Dickey then had only two wash dresses. Obviously, such bits of evidence out of the volume of evidence relating to the question of whether there was any fraud connected with the property settlement agreement entered into in 1944 or whether the findings of fact and decree of the Kansas Court is entitled to full faith and credit by the Colorado Courts are immaterial.

Also on page 2 opposing counsel quote part of the sentence from the Trial Court's findings of fact to the effect that Respondent was "a true and faithful wife up until a period shortly before the institution of the divorce action" and then also quote the statement of the Trial Court "that in later years George P. Dickey was an excessive drinker and abusive in his conduct towards his wife". If these particular findings could have any bearing upon the question now presented to the Court, then equally pertinent is the finding of the Colorado Trial Court which counsel has omitted and which connects the two quotations contained on page 2 of the opposing brief and which reads:

"(b) That shortly prior to this time she had be-

come infatuated with one of their employes, a Mr. Bartges, and that she undoubtedly had made an ill-advised trip with him to Colorado which might have resulted in a criminal prosecution;"

On page 4 of the opposing brief counsel state that the balance sheets furnished by Mr. Dickey to the then Mrs. Dickey's counsel preliminary to the property settlement agreement did not identify any specific property owned by Dickey. This certainly is not the fact. The balance sheets which were furnished are attached to the Respondent's complaint which she filed in the Colorado District Court and are shown at pages 17-24 of the Record. The Dickey balance sheet shows everything that Dickey owned, and no contention to the contrary was made either in the pleadings or by way of evidence. Among other items of property which the Dickey balance sheet shows he owned was 80% of the common capital stock of the Dickey Oil Company and none of the 1500 shares of the outstanding preferred stock. It shows that he owned 76 shares out of 150 of another corporation named Geo. P. Dickey, Inc. Then, to Mr. Dickey's balance sheet, were attached balance sheets of these two corporations in which he owned only part of the stock.

Again, on page 4 of the opposing brief, it is stated that the Respondent or her counsel were not given any information regarding the extent and value of the Dickey marital property and that there is an abundance of testimony to show that they did not possess such knowledge. This statement is made notwithstanding the vast amount of contrary evidence, such as the following:

Mrs. Dickey did not personally conduct the settlement negotiations relating to the property settlement agreement, but they were conducted solely in her behalf by her attorney, Mr. Robert C. Foulston, of Wichita, Kansas. Mr. Foulston was admittedly an experienced and able attorney (R., pp. 181, et seq.). Foulston knew that the balance sheets furnished

him by Mr. Dickey were what they purported to be, namely, balance sheets, which showed book values and not actual values. He expressly admitted he was not misled by the balance sheets (R., pp. 249-250). Notwithstanding the statement in the opposing brief that Mrs. Dickey entered into the property settlement agreement upon Mr. Foulston's assumption that Dickey was worth two and a half million dollars, the Record is replete with evidence consisting, to a large extent, of Mr. Foulston's own testimony that he had evidence before him which satisfied him that Dickey was worth much more than that and from five million dollars upwards (R., pp. 199, 201, 203, 210, 216, 217, 221, 226, 239, 240, 241, 250). (The above are references to Foulston's testimony at the trial. Foulston, who was the attorney who negotiated the property settlement agreement for Mrs. Dickey, was practically her sole witness on the fraud issue at the trial of the case.)

It will be noted that the balance sheet of Dickey Oil Company, which was submitted to Foulston (R., p. 24), expressly shows that during the period from July 1, 1943, to November 30, 1943, that company had a profit of $337,531.18, which was at the rate of over $800,000 per year. Foulston was familiar with and recognized the import of this profit showing (R., pp. 250, 251).

When the financial statements or balance sheets were furnished to Mr. Foulston, his accountant and Dickey's accountant considered them, and Foulston's accountant was offered further assistance, if desired, which was never requested (R., p. 340). After the financial statements were furnished Foulston, he never asked Dickey's attorneys for any further information as to Dickey's assets (R., p. 203). Foulston never intended to base he settlement upon a per cent of Dickey's properties (R., p. 223), but numerous things, in addition to Dickey's financial worth, entered into the property settlement, which were testified to at length by Foulston (R., pp. 223, et seq., 323, et seq., 332, et seq.). This was so found by the Trial Court (R., p. 8.).

On page 6 of the opposing brief attention is called to the evidence that more than eight months after the property settlement agreement and the Kansas divorce decree Stanolind Oil and Gas Company purchased all of the stock of Dickey Oil Company for $6,260,000. Reference is not made to the fact, however, that Dickey only owned 80% of the common capital stock of Dickey Oil Company and none of the preferred stock (R., p. 18), and that Dickey's gross share of the proceeds of the sale of the stock of Dickey Oil Company was $4,888,000, and that his net, after expenses of sale and income tax resulting from the sale, was approximately $3,685,000 (R., pp. 351, 352).

Attention in this connection might well be called to a substantial amount of evidence in the case showing that the stock of Dickey Oil Company had tremendously increased in value between February 7, 1944, when the property settlement agreement was entered into and the Kansas decree entered, and the time of the sale of the stock of Dickey Oil Company to Stanolind Oil and Gas Company in the latter part of October 1944. This increase resulted from the finding and development of a new oil pool near Oklahoma City, Oklahoma, known as the West Edmond Pool (R., pp. 257-317).

The above and a vast amount of other evidence is the basis of the Trial Court's finding that there was no fraud or duress on the part of Mr. Dickey in connection with the property settlement agreement or the Kansas divorce and property settlement case.

Mrs. Dickey was admittedly improvident. Her attorney, Foulston, so testified in the present case (R., p. 227), as did Mr. Howard T. Fleeson, one of Mr. Dickey's attorneys in the divorce action (R., pp. 331-333). As a result of this improvidence and to protect her against her own improvidence, Mrs. Dickey created a spendthrift trust for her benefit with $250,000 out of the $325,000 settlement money. Then Mr. Foulston, while on the witness stand in the present case, stated

and testified (R., p. 228) "I agreed with Mr. Fleeson from the beginning on that subject. I agree now that if there is a recovery in this case that that likewise should go into some sort of a trust arrangement so that Mrs. Dickey—Mrs. Bartges now—cannot have it to squander." It was because of such testimony that the Trial Court, finding as it did that, notwithstanding the absence of fraud or coercion, but because of Dickey's wealth, Mrs. Bartges was in equity entitled to more out of the Dickey Estate than she received under the property settlement agreement, concluded to require the additional amount to be allowed her to be placed in a trust for her benefit. This requirement that the additional amount to be allowed Mrs. Bartges should be set up in a trust is the part of the Trial Court's decree which the Colorado Supreme Court reversed.

We again state our regret in feeling it incumbent upon us to thus even briefly refer to the evidence in the case, but, as above stated, we did not feel justified in the interest of our clients in letting stand unrefuted the underlying or background picture attempted to be painted in the opposing brief.

ARGUMENT

I.

The Nature Of The Proceedings And Judgment In the Colorado Courts

The complaint filed in this case (R., pp. 2-34) is based upon the express allegation that Dickey, in order to induce Mrs. Dickey to enter into the property settlement agreement, falsely and fraudulently represented that the financial statement submitted to her accurately reflected the value of his assets and that, in reliance upon such false and fraudulent representations, she entered into the property settlement agreement. She claimed in her complaint that, as a result of these false and fraudulent representations, she was damaged to the extent of two million dollars, and she brought this action *as an action at law* to recover this alleged damage. To her complaint are attached and made a part thereof the find-

ings of fact, judgment and decree of the Kansas Court, the financial statement which she claims was false and fraudulent and the property settlement agreement.

To this complaint was filed a lengthy answer consisting of some thirteen defenses, including a defense denying the fraud and including a defense raising the question of the full faith and credit protection of the Federal Constitution.

A long trial was had, with voluminous evidence, both oral and documentary, introduced.

The Trial Court in due course entered its findings and decree (R., pp. 73-95). It specifically found that Dickey was not guilty of fraud or duress in connection with the property settlement agreement. While not a pleaded issue in the case, the Trial Court's findings conclusively negative any concealment fraud on the part of Dickey in connection with the property settlement agreement. This in itself must necessarily have defeated any action at law for the recovery of damages based upon fraud, whether that fraud be actual or so-called concealment fraud. If there was no fraud, there could be no damages. However, the Trial Court, instead of dismissing the action after so finding, concluded that it was its duty to do equity, or what it considered equity. It held that for a man of Dickey's wealth, whether that wealth be two and a half million dollars, as Foulston indicated at one place in his testimony he thought it was at the time of the property settlement, or approximately six million dollars, as they now contend it was, to give his wife by way of property settlement only $325,000 in cash, plus miscellaneous property, was "niggardly" (R., p. 82) and that this fact alone "stamps the agreement as being inadequate and unfair and he was, therefore, guilty of extrinsic fraud in entering into such an agreement" (R., p. 83). It is thus clear that the so-called "extrinsic fraud" which the Trial Court found to exist consisted only of the alleged inadequacy of the property division, viewed solely in the light of Dickey's wealth and without

taking into consideration the various other elements which Foulston testified and the Trial Court found (R., p. 91) were considered and notwithstanding the fact that the Court had already found that there was no fraud or duress connected with the settlement. The Trial Court then concluded (R., pp. 92, 93) that it was its duty to allow Mrs. Dickey a further amount of the Dickey Estate, which, when coupled with the amount received under the property settlement agreement, would constitute what the Colorado Trial Court thought would be a fair and equitable division of the property (R., p. 91, 93). The Trial Court then proceeded to require the creation of a new trust under which Mrs. Dickey would get $450 per month in addition to the $550 per month she is already receiving out of the trust created with the moneys received from the property division (R., p. 93, 94).

The above is the nature of the action and the nature of the findings of fact and judgment entered by the Trial Court.

Being of the opinion that the Trial Court was in error in allowing a further property division to Mrs. Bartges, the former Mrs. Dickey, after finding that there was no fraud or duress connected with the property settlement agreement, and in view of the findings of fact and decree of the Kansas Court, Petitioners, as Executors of the Dickey Estate, took the case to the Colorado Supreme Court.

Likewise, Mrs. Bartges took the case to the Colorado Supreme Court, assigning various alleged errors, including the action of the Trial Court in tying up any relief granted in the form of a trust, and also attacking the finding of the Trial Court that Dickey was not guilty of fraud or duress.

The Colorado Supreme Court (R., p. 20) affirmed the findings of the Trial Court and reversed the judgment of the Trial Court only to the extent of requiring a money judgment instead of the creation of a trust fund to cover the additional allowance to be made Mrs. Dickey. As will be

seen from the opinion of the Colorado Supreme Court, this affirmance is grounded upon the existence of so-called "extrinsic fraud" which consisted only of the inadequacy of the property division in view of Dickey's wealth, even though the property division was not tainted by fraud, duress or coercion. The Colorado Supreme Court reversed with directions (R., p. 444) to the Trial Court "to enter a money judgment for such sum as shall be determined by the court, from the evidence heard upon the trial, as will result in a fair and equitable division of property as required under Kansas law". Clearly, again, notwithstanding the name it may be called, this is not a judgment for damages based upon fraud, because fraud is nonexistent as found by the Trial Court. It is an order for a judgment requiring a further division of property and that is all. As the Colorado case was originally filed, it might be considered as having constituted an action at law for damages based upon fraud. As it ended, however, it is merely an action for property division as between a former husband and wife, notwithstanding a property settlement agreement between them, untainted by fraud, duress or coercion, which, under the Kansas decisions, as admitted by opposing counsel on pages 14 and 15 of their brief, would be binding and conclusive upon the Kansas Courts. The Colorado Supreme Court recognized this to be the Kansas law (R., pp. 430-433) in its references to and quotations from *Petty v. Petty*, 147 Kan. 342, 76 P. (2d) 850; *Hyde v. Hyde*, 143 Kan. 660, 56 P. (2d) 437; Id., 147 Kan. 134, 75 P. (2d) 1023; and other cases therein cited.

II.

The Nature Of The Proceedings In And Findings Of Fact And Decree Of The Kansas Court

In her petition against Mr. Dickey, filed October 27, 1943, in the District Court of Sedgwick County, Kansas, (Abstract of Exhibits, pp. 12-15) Mrs. Dickey set forth alleged grounds for divorce and also alleged that during the marital period the parties had accumulated a large amount

of property, most of which stood in Mr. Dickey's name. She prayed for a divorce and for a property division.

Mr. Dickey filed an answer and cross-petition for divorce (Abstract of Exhibits, pp. 17-20). Mrs. Dickey, through her attorneys, filed a "Motion for Property Statement" (Abstract of Exhibits, p. 20). It was after this that the financial statement hereinabove referred to was furnished by Mr. Dickey to Mrs. Dickey through their respective attorneys.

Then on February 7, 1944, the property settlement agreement (R., p. 25) was entered into between Mr. and Mrs. Dickey. At the same time Mrs. Dickey created the spendthrift trust with $250,000 out of the $325,000 cash received in the property division (R., pp. 179-180). A hearing was thereupon had before the Kansas Court and it entered its findings of fact and decree, copy of which is attached to the complaint filed in the Colorado action and made a part thereof (R., pp. 9-17). These findings of fact and decree were approved and consented to by both Mr. and Mrs. Dickey through their respective attorneys (R., p. 17). That this was a consent decree is admitted in the opposing brief. Mrs. Dickey herself was present in the Kansas Court at the hearing and testified. In the Colorado trial her attorney, Foulston, testified to the effect that the Kansas Court asked Mrs. Dickey if she understood the contract and she said she did (R., pp. 179-180).

The Kansas Court then found (R., p. 10) that the property settlement agreement

> "* * * was by the parties submitted to the court for consideration of the court, and the court, being duly advised in the premises, finds that said property settlement, under the circumstances, is a fair and equitable division of the properties accumulated by the parties during said marriage and that the same should be approved by the court."

The Kansas Court then decreed (R., p. 13)

> "Second: That the property settlement made between the parties hereto be, and the same is hereby, approved by the court, and that said division of property and the settlement of their mutual rights is fair, reasonable and equitable under all the circumstances, and that the court makes no order for the payment of any alimony to the plaintiff in this case."

The Kansas Court further decreed (R., p. 16)

> "Seventh: It is further ordered by the court that each of the parties hereto be, and they each are hereby, permanently and perpetually enjoined from claiming or asserting any right, title or interest in and to the property of the other as the same is established by the property settlement of the parties, or in and to any property which either party may hereafter acquire by purchase, gift, descent, or otherwise."

Respondent's counsel say that all the Kansas Court did was to "approve" the property settlement agreement. Upon this premise they argue that the property settlement agreement was not merged in the findings of fact and decree of the Kansas Court. The Kansas Court's findings of fact and decree, however, go much further than a mere approval of the property settlement agreement. The Kansas Court made a specific finding that the property division evidenced by the property settlement agreement was fair, reasonable and equitable, and it so decreed. As we pointed out in our opening brief (pp. 36-39), the Kansas Supreme Court in *Petty v. Petty*, 207 P. (2d) 428, 167 Kan. 510, and *Hullet v. Hullet*, 133 Kan. 738, 3 P. (2d) 470, has distinguished between findings and decree which merely "approve" a property settlement agreement and findings and decree in which the Court finds that the contract submitted to the Court constitutes a fair and equitable division. Where such finding is contained

in the decree, then, as the Kansas Supreme Court held in *Hullet v. Hullet*, "By such order the court clearly spelled out the terms of the contract in its judgment decree". So in this Dickey case the Kansas Court has in its decree spelled out the terms of the Dickey property settlement agreement by its findings and decree that the division of property evidenced thereby, under all the circumstances, was fair, reasonable and equitable. It is this finding and this decree that the property division was fair, reasonable and equitable rather than the mere "approval" of the property settlement agreement which we submit constitutes an adjudication by the Kansas Court as to the fairness, reasonableness and equity of the property settlement agreement.

Opposing counsel state that the Colorado action is a different action than the Kansas action. We have answered this above. In both was sought a division of property and the relief granted by both is a division of property.

Opposing counsel state there was no issue of fraud, duress or concealment tendered in the Kansas proceedings. It will be kept in mind, however, that the Colorado Court has held that there was no such fraud, duress or concealment. Absent any such fraud, duress or concealment, then, as pointed out by the Colorado Supreme Court in its opinion (R., pp. 430-432), the Kansas Court was duty bound to approve the property division. On the other hand, if there was fraud or duress connected with the property settlement agreement, then, under the Kansas decisions relied upon, the Kansas Court was not bound to approve the property settlement agreement and those fraud issues could have been submitted to the Kansas Court. Under the Kansas decisions, a judgment is res judicata, not only as to matters actually decided, but also as to matters which could have been submited to and decided by the Court. This rule has been held particularly applicable to property division and alimony in connection with divorce proceedings.

The basic law in Kansas announcing this principle is *Roe v. Roe*, 52 Kan. 724, 35 P. 808, decided in 1894, and which has been cited and approved in numerous cases since that time. We quote from the Pacific report, page 809:

> "Under the law of Kansas the court rendering judgment in an action for divorce is authorized, on a proper showing, to grant alimony, whether the divorce be allowed or not. If the divorce is granted, it operates as an absolute dissolution of the marriage tie. Whatever orders with reference to alimony *or a division of the property* are desired by either party may then be considered and determined by the court. *If they may be so considered and determined, and a party neglects to require such determination, the judgment is as full and complete a bar as if the question had been tried and determined.*" (Emphasis supplied)

The principle announced in the *Roe* case has been followed in a long line of Kansas decisions. *Zellner v. Zellner*, 155 Kan. 530, 127 P. (2d) 428; *Calkins v. Calkins*, 155 Kan. 43, 122 P. (2d) 750; *McCormick v. McCormick*, 82 Kan. 31, 107 P. 546; *Roberts v. Fagan*, 76 Kan. 536, 92 P. 559; *Pinkerton v. Pinkerton*, 122 Kan. 131, 251 P. 416; *Fusselman v. Fusselman*, 122 Kan. 515, 253 P. 411; *Heivly v. Miller*, 102 Kan. 313, 169 P. 1141; *Mayfield v. Gray*, 138 Kan. 156, 23 P. (2d) 498; *Boyles v. Emery*, 159 Kan. 300, 153 P. (2d) 936; *Elliott v. Elliott*, 154 Kan. 145, 114 P. (2d) 823; *Raney v. Matney*, 128 Kan. 426, 278 P. 26; *Putnam v. Putnam*, 104 Kan. 47, 177 P. 838.

For the various reasons above refuted, counsel for Respondent contend that, once the property division was entered into between Mr. and Mrs. Dickey, the Kansas Court lost jurisdiction of the property division issue or question tendered to it by the petition filed in that case, and from this they argue that the findings of fact and decree of the Kansas Court, notwithstanding that they purport to find the

property division to be fair and equitable and so decree and also enjoin the parties from asserting any rights against the other contrary to the property settlement agreement, is void and nugatory because beyond the jurisdiction of the Court. We feel that we have fully answered this contention above, but there is one further complete and conclusive answer which we have suggested in our opening brief (pp. 40, et seq.), but which is given only nodding attention on page 17 of the opposing brief. This point is that the Kansas decree is admittedly a "consent decree". It does contain the findings and the decree above quoted to the effect that the property division evidenced by the property settlement agreement was fair, reasonable and equitable. It does contain the injunction quoted above enjoining both Mr. and Mrs. Dickey from asserting any rights in the property of the other inconsistent with the property settlement agreement. These provisions were inserted in the Kansas findings of fact and decree by consent of the parties. The Kansas Supreme Court in a number of decisions, both old and recent, has decided that consent decrees are binding upon the parties. This covers situations where, in the absence of the consent, the Court rendering the decree would not have jurisdiction to enter the particular decree. The Kansas authorities so holding are cited and quoted from on pages 40-43 of our opening brief. The Kansas decree, being a consent decree, is res judicata as to the matters covered thereby, irrespective of the jurisdiction of the Court to enter it in the absence of such consent.

III.

Full Faith And Credit Has Been Denied

Respondent's position, sustained by the Colorado Supreme Court, is that, under the Kansas law, a wife at the time of a divorce is entitled to a fair and equitable property division; that in the instant case Mrs. Dickey, now Mrs. Bartges, did not get such a fair and equitable division under the property settlement agreement because of the inade-

quacy of the amount received in comparison to Mr. Dickey's wealth and, therefore, it is claimed to follow that, even though there was no fraud or duress in connection with the property settlement agreement, the Colorado Court has the right to give Respondent such an additional amount of the Dickey Estate property as, when added to the amount received under the property settlement agreement, will constitute a fair and equitable division. It is contended and has been held by the Colorado Supreme Court that neither the property settlement agreement itself nor the Kansas decree bars such relief, and it is this relief which the Colorado Supreme Court has ordered granted.

Petitioners contend that such relief must necessarily fail to give the full faith and credit to the findings of fact and decree of the Kansas Court required by the Federal Constitution. To us this seems obvious. Concededly the test of full faith and credit is that the Courts of one State must give the same effect to the judgments and decrees of the Courts of other States as are given them in the State where rendered. Applying this principle to the instant case, the following appears:

(a) The Kansas Court did find and decree as a matter of fact that the property division evidenced by the property settlement agreement was fair, reasonable and equitable. It did enjoin the parties from asserting any rights in the property of the other inconsistent with the property settlement agreement. Such a finding and such a decree is binding on the parties and res judicata under the Kansas laws. The Kansas decree more than "approved" the property settlement agreement. It found and decreed facts, and, under the Kansas Supreme Court decisions, supra, this spelled out the contract in the decree and made the property division so spelled out a part of the decree, and this is what the Kansas Court has held constitutes a binding and res judicata decree. For the Colorado Courts to now be permitted to

find that the property division was not fair, reasonable and equitable is to permit them to do something that could not be done by the Kansas Court.

(b) It is no answer to say that the effect of the execution of the property settlement agreement was to withdraw the property division question from the jurisdiction of the Kansas Court. This argument destroys itself, as we see it. Under the Kansas decisions referred to supra and cited by opposing counsel, as well as by the Colorado Supreme Court, the Kansas Court is duty bound to approve a property division agreement if it is free of fraud and is equitable. It is not so bound if it is not free of fraud or is not equitable. If the Kansas Court was bound to approve the Dickey property settlement agreement, it must have been because it was free of fraud and equitable. This would destroy the basis of the cause of action attempted to be asserted in Colorado. On the other hand, if the property settlement agreement was not free of fraud and equitable, then the Kansas Court was not bound to approve it and could not be said to have lost jurisdiction over property division.

(c) The effect of the Colorado Supreme Court ruling is that, in all instances, a wife in connection with a divorce is entitled to a fair and equitable property division. This is contrary to the Kansas law, for the Kansas decisions referred to supra hold that, while the Kansas divorce court has jurisdiction of property division, a wife is barred on res judicata principles from receiving a property division if she does not assert that right in the divorce proceedings. If it could be assumed, therefore, that the Kansas decree did not affirmatively adjudicate property division, nevertheless, that decree would be res judicata on property division in any other Kansas Court and would bar the Respondent from claiming a property division in any other Kansas Court.

(d) Finally, as we have pointed out above, the Kansas decree was a "consent decree". It does, we submit, affirma-

tively find and decree that the property division evidenced by the property settlement agreement was fair, reasonable and equitable. Being such a consent decree, then, under the Kansas law, it is res judicata and binding upon the parties thereto as to its property division provisions the same as its other provisions, irrespective of whether, in the absence of such consent, the Kansas Court would have had jurisdiction to adjudicate the property division.

Notwithstanding that the Respondent could get no relief in Kansas because of the res judicata effect there of the Kansas decree, the Colorado Court has given her such relief here and has expressly found the Kansas decree to be no bar to relief in Colorado. We have, therefore, a situation where there was a divorce action in Kansas in which the issue of property division was tendered. This was followed by a property settlement agreement which the Colorado Court has found to be free from fraud or duress. It was followed by a decree entered by the Kansas Court, consented to by both parties, in which the property division evidenced by the agreement itself was found to be fair, reasonable and equitable and the parties were enjoined from asserting any rights contrary thereto. Notwithstanding all of the above, including the injunction in the Kansas decree, the Colorado Court proposes to permit the Respondent to secure an additional part of the Dickey Estate property because of its finding that the amount she received under the property settlement agreement was not a fair and equitable division of the property, solely in view of Mr. Dickey's wealth.

We submit that it is clear that any such relief must necessarily fail to give the full faith and credit to the Kansas decree required by the Federal Constitution.

IV.

The Finality Of The Judgment

A substantial portion of the opposition brief is in support of Respondent's position that the judgment to which

this writ of certiorari is sought does not have such finality as would justify certiorari. We believe it will serve no useful purpose to analyze the various decisions cited in Respondent's brief. A most recent analysis of what constitutes finality for certiorari purposes is contained in the opinion of this Court in *Republic Natural Gas Co. v. State of Oklahoma*, 334 U. S. 62, 92 L. Ed. 1212. Page references now made are to the Law Edition report.

In that case this Court said:

> "No self-enforcing formula defining when a judgment is 'final' can be devised. Tests have been indicated which are helpful in giving direction and emphasis to decision from case to case. Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined, and all that needs to be adjudicated is the amount of damages. (Citing cases)
>
> "On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable. * * *." (page 1219)

Quoting Syllabus 10 (page 1214):

> "10. The possibility that matters left open by a state court's judgment may generate additional constitutional questions requires a finding that the finality essential to a review of such judgment by the Supreme Court of the United States does not exist."

Quoting also from the dissenting opinion (pages 1225 and 1227):

> " * * *. But not every decision by a state court of last resort leaving the controversy open to further

proceedings and orders is either inconclusive of the issues or premature for purposes of review under sec. 237. * * *." (page 1225)

"This case therefore is one in which the need for further proceedings may never arise and almost certainly would not do so if the constitutional question were now determined. * * *." (page 1227)

In the instant case the full faith and credit constitutional question has been "finally" decided. There is no chance, as there was in the *Republic Natural Gas Company* case, that additional federal questions can be raised. A ruling by this Court that the full faith and credit requirement of the Federal Constitution has been violated would end the case.

Furthermore, there is really nothing except a ministerial act to be performed by the Trial Court pursuant to the Supreme Court remand. The Trial Court found that the property settlement agreement did not evidence a fair and equitable division of the property involved and that to give Mrs. Dickey, now Mrs. Bartges, an equitable property division would require her to receive an additional $450 per month over and above the $550 per month which she is now receiving as a result of the property settlement agreement. In order that Respondent might secure this additional $450 per month, the Executors of the Dickey Estate were ordered by the Trial Court to create a trust out of which she would receive this monthly sum. The Colorado Supreme Court has affirmed the Trial Court, with the exception that the Trial Court is required to enter a money judgment instead of requiring the creation of a trust. The amount of this money judgment, under the Colorado Supreme Court opinion, is to be determined by the Trial Court "from the evidence heard upon the trial" and is to be such amount as will result in a fair and equitable division of the property as required under Kansas law. No new evidence is to be permitted. The amount is to be based upon the evidence heretofore introduced

and, as above stated, is to constitute a fair and equitable division of the property as required by the Kansas law. The Trial Court has already found what that fair and equitable division is, namely, an amount which will produce to Respondent an additional $450 per month. It is a mere ministerial and mathematical act to determine that amount.

For all of these reasons we respectfully submit that this record presents a judgment with the character of finality necessary to give certiorari jurisdiction to this Court.

Respectfully submitted,

KARL F. CRASS,
Equitable Building,
Denver, Colorado,
JOHN P. AKOLT, JR.,
R. A. DICK,
JOHN P. AKOLT,
1300 Telephone Building,
Denver, Colorado,
Attorneys for Petitioners.

AKOLT, CAMPBELL, TURNQUIST & SHEPHERD,
1300 Telephone Building,
Denver, Colorado,
Of Counsel.
February 1950.

FILE COPY

FILED
JAN 27 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term — 1949

No. 504

UNITED STATES NATIONAL BANK OF DENVER and HILDRED L. DUGAN, as Executors of the Estate of George P. Dickey, Deceased, *Petitioners,*

versus

RUBY DICKEY BARTGES, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE SIEFKIN,
JOHN F. EBERHARDT,
Of Wichita, Kansas,

MAX MELVILLE,
Of Denver, Colorado,
Counsel for Respondent.

20 January 1950

Prairie Publishers, Inc., Wichita 2, Kansas

SUBJECT INDEX

	PAGE
A. Opinions Below	1
B. Jurisdiction	2
C. Statement of the Case	3
D. Summary of Argument	8
E. Argument and Authorities	9
I. The Decree Below Is Not Final Since It Remands the Case to the District Court For Judicial Determination of Plaintiff's Damages	9
II. The Colorado Supreme Court Did Not Deny "Full Faith and Credit" to the Kansas Divorce Decree	14
F. Conclusion	21

INDEX TO AUTHORITIES

Cases:

	PAGE
Bruce v. Tobin, 245 U.S. 18, 62 L. ed. 123	11, 12
California National Bank v. Stateler, 171 U.S. 447, 43 L. ed. 233	11
Catlin v. United States, 324 U.S. 229, 89 L. ed. 911	11
Cessna v. Cessna, 155 Kan. 856, 130 P. (2d) 560	19
Cummings v. Cummings, 138 Kan. 359, 26 P. (2d) 440	19
Davis v. Crouch, 94 U.S. 514, 24 L. ed. 281	11, 13
Davison v. Davison, 125 Kan. 807, 266 Pac. 650	19

INDEX TO AUTHORITIES (Cont'd.)

PAGE

Drake v. Kochersperger, 170 U.S. 303, 42 L. ed. 1046 11

Folansbee v. Ballard Paving Co., 154 U.S. 651, 25 L. ed. 802 11

Gospel Army v. Los Angeles, 331 U.S. 543, 91 L. ed. 1662 9

Grant v. Life Ins. Co., 106 U.S. 429, 27 L. ed. 237 11

Hoard v. James, 119 Kan. 138, 237 Pac. 888 19

Holder v. Holder, 143 Kan. 79, 53 P. (2d) 806 .... 19, 20

Hullet v. Hullet, 133 Kan. 738, 3 P. (2d) 470 16

Hyde v. Hyde, 143 Kan. 660, 56 P. (2d) 437; *id.*, 147 Kan. 134, 75 P. (2d) 1023 15

Lacelede Gas Light Co. v. Public Service Comm., 304 U.S. 398, 82 L. ed. 1422 11

Leach v. Leach, 46 Kan. 724, 27 Pac. 131 14

Leslie v Manufacturing Co., 102 Kan. 159, 169 Pac. 193 15

Lodge v. Twell, 135 U.S. 232, 34 L. ed. 153 11

Magnolia Petroleum Company v. Hunt, 320 U.S. 430, 88 L. ed. 149 17

Mann v. Mann, 136 Kan. 331, 15 P. (2d) 478 20

Mann v. Mann, 135 Okla. 211, 275 Pac. 348 19

Martinez v. International Banking Corp., 220 U.S. 214, 55 L. ed. 438 11

Mississippi Central Railroad Co. v. Smith, 295 U. S. 718, 79 L. ed. 1673 11

INDEX TO AUTHORITIES (Cont'd.)

	PAGE
Montgomery v. Anderson, 62 U.S. 386, 16 L. ed. 160	11
Newton v. Consolidated Gas Co., 265 U.S. 78, 68 L. ed. 909	13
North Carolina R. Co. v. Swasey, 90 U.S. 405, 23 L. ed. 136	11
Pattison v. Pattison, 129 Kan. 558, 283 Pac. 483	19
Perkins v. Perkins, 154 Kan. 73, 114 P. (2d) 804	15
Petty v. Petty, 147 Kan. 342, 76 P. (2d) 850; *id.*, 167 Kan. 510, 207 P. (2d) 428	15, 16
Putnam v. Putnam, 102 Kan. 47, 177 Pac. 838	19
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 92 L. ed. 1212	11, 12
Schoonover v. Schoonover, 172 F. (2d) 526 (C. C.A. 10)	16
Shaffer v. Shaffer, 135 Kan. 35, 10 P. (2d) 17	15, 19
Tobin v. Tobin, 89 Okla. 12, 213 Pac. 884	19
Union Mutual Life Ins. Co. v. Kirchoff, 160 U.S. 374, 40 L. ed. 461	11
Washington ex rel. Grays H. L. Co. v. Superior Court, 243 U.S. 251, 61 L. ed. 702	11
Watson v. Watson, 104 Kan. 578, 180 Pac. 242	19
Statutes:	
Title 28, United States Code, Section 1257	9
G. S. Kan. 1947 Supp., 60-1511	19
12 Okla. Stats. Ann. §1278, p. 179	19

Supreme Court of the United States

October Term — 1949

No. 504

UNITED STATES NATIONAL BANK OF DENVER and HILDRED L. DUGAN, as Executors of the Estate of George P. Dickey, Deceased, *Petitioners,*

versus

RUBY DICKEY BARTGES, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Your Respondent, Ruby Dickey Bartges, in opposition to the petition for writ of certiorari and supporting brief, respectfully shows to this Honorable Court:

A.

OPINIONS BELOW

The opinion of the District Court of Denver, County, Colorado is shown at pages 73-95 of the Record. It is not reported.

The opinion of the Colorado Supreme Court, rendered 14 July 1949, is not yet officially reported. Unofficially it is reported in 210 P. (2d) 600 (Advance Sheet), and appears at pages 420-444 of the record herein. Per curiam opinion denying petition for rehearing is unreported, but appears at page 491 of the record.

B.

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction under Title 28, United States Code, Section 1257 (3). The decree of the Colorado Supreme Court was rendered on 14 July 1949. Timely petition for rehearing was denied on 3 October 1949. Petition for writ of certiorari was filed on 28 December 1949.

C.

STATEMENT OF THE CASE

This was an action by Respondent, Ruby Dickey Bartges, against her divorced husband, George P. Dickey (Petitioners' predecessor), to recover damages sustained by virtue of a property settlment contract, executed by the parties during the pendency of their divorce suit, under which she received a grossly inequitable division of jointly accumulated marital property. Respondent premised her right of recovery not only upon express fraud (affirmative misrepresentations by Mr. Dickey concerning the extent and value of the marital property which was the subject matter of the contractual negotiations), but also upon constructive or "extrinsic" fraud (nonperformance of her husband's affirmative duty to make full and complete disclosure to her of the extent and value of the marital property)—see, e. g., Colorado Supreme Court opinion, R. 435-437. The basic facts essential to an understanding of the controversy are as follows:

Respondent and George P. Dickey were married in 1924 (R. 73). She bore Dickey three children, one of

whom died, and also raised for Dickey another child of his by a previous marriage (R. 73). Their marriage lasted approximately nineteen years—until 7 February 1944 (R. 9). Although Dickey was "an excessive drinker and abusive in his conduct towards his wife" (R. 82), Respondent was "a true and faithful wife up until a period shortly before the institution of the divorce action" (R. 82).

At the time of their marriage Dickey had no property of any value (R. 79). In fact, when their first child was born in June, 1926 (R. 157), he was unable to discharge the medical and hospital bills (R. 153). And in the spring of 1927 friends "took up a collection to pay the gas, water and light bills and buy some food, and also buy Mrs. Dickey some clothes. She had two wash dresses" (R. 157). By the time of their divorce, however, the marital partnership had accumulated assets worth between five and six million dollars (R. 79). Under Kansas law Respondent was entitled, in event of divorce, to a fair and equitable division of this jointly accumulated property (e. g., see Colorado Supreme Court opinion, R. 428-429).

Respondent instituted her suit for divorce in the District Court of Sedgwick County, Kansas, the state of the parties' residence, in October, 1943 (R. 73). Thereupon her counsel, Mr. Foulston, met with Dickey's counsel, Messrs. Pringle and Fleeson, in an attempt to negotiate a property settlement (R. 170-171). By Kansas law Dickey was obligated to exercise utmost good faith towards Respondent in those negotiations and to make full and complete disclosure to her of the extent and value of the marital property (see e. g., Colorado Supreme Court opinion, R. 438-439). At the first conference of attorneys Mr. Foulston demanded a full disclosure by Dickey with

respect to the marital assets (R. 171), and Mr. Fleeson agreed to furnish the requisite information (R. 171, 319). Mr. Pringle then requested one Bonicamp, Dickey's accountant, to prepare such a statement for Mr. Foulston (R. 319). Bonicamp did prepare certain "balance sheets" (being Exhibit "B" to Respondent's instant complaint, R. 17-24) pursuant to this request (R. 335-336, 357-358). But those balance sheets did not identify any specific property owned by Dickey. Moreover, they did not show values; instead, they merely listed investment costs (R. 74). And this was the *only* disclosure made by Dickey to Respondent regarding the extent and value of the marital estate (R. 174, 216-217, 322-323, 334).

When Bonicamp handed the "balance sheets" to Dickey and his attorneys he advised them that because of "discovery and production" in the West Edmond, Oklahoma, oil pool the books and "balance sheets" did not reflect values, and he told them "they should explain that to whom it (the 'balance sheet') was delivered to" (R.336-337). No such explanation was ever made. Neither Respondent nor her counsel knew Dickey had any interest in the West Edmond pool (e. g., R. 197, 198, 217, 219-220, 234-235, 237), notwithstanding this pool was supplying fifteen to twenty percent of Dickey's income (R. 363-364) and was constantly increasing in value (R. 257).

In short, there was no evidence adduced to show Respondent or her counsel knew or were given any information regarding the extent and value of the Dickey marital property; and there was an abundance of testimony to show they did *not* possess this vital knowledge (e. g., R. 175, 197, 198, 217, 219-220, 234-235, 237). In this connection, when, at inception of the settlement negotiations, Respondent's counsel speculated that Dickey might be worth approximately five million dollars, Dickey's

counsel Mr. Pringle asserted that figure was "clear out of line" (R. 171) and that "maybe" Dickey was worth as much as $2,500.00 (R. 173). Settlement was negotiated in reliance upon this statement by Dickey's attorney (R. 224, 226, 229), and a property settlement agreement was executed by both parties on 7 February 1944 (Exhibit "C" to instant complaint, R. 25-34). By that agreement Respondent received $75,000 in cash (most of which was required to discharge existing debts —R. 166) and $250,000 in trust under an arrangement providing for the payment of $550 per month to her for her life, with the corpus passing to the two children upon her death (R. 74-75). At the same time, she forfeited all interest in a prior $250,000 trust irrevocably established for her in 1941 but which terminated in event of divorce (R. 83,242; Abst. Ex. 41).

After the settlement was signed, an abbreviated hearing was held in the Kansas divorce court. Dickey withdrew both his answer and his cross petition (R. 9), and Respondent introduced evidence pertaining to, but only to, her right to a divorce (R. 10, 179-180; see Colorado Supreme Court opinion, R. 424). Thereupon the settlement contract was submitted to the court for its "approval" (*id*). But there was no evidence whatever introduced as to the extent or value of the Dickey's marital estate, so the court had no possible means of considering or determining whether the amount awarded to Respondent by the contract was or was not "fair and equitable" (*id.*). No issue of fraud, affirmative or constructive, was raised by the pleadings or passed upon by the court (*id.*; also, Colorado Supreme Court opinion, R. 430, 433). Finally, under Kansas law the agreement was absolutely binding upon the divorce court absent any complaint there levelled against it by the parties, and the court lacked juris-

diction to disapprove or modify the contract (e. g., see Colorado Supreme Court opinion, R. 430-433). At the conclusion of the hearing the Kansas court granted Respondent a divorce from Dickey and accorded its perfunctory, meaningless "approval" to the settlement agreement (R. 9-17), the decree being rendered on 7 February 1944 (R. 9).

Almost immediately thereafter Respondent and Dickey both left Kansas and took up permanent residences in Colorado, she in Pueblo and Dickey in Denver. (R. 75). Eight months later Stanolind Oil and Gas Company purchased the stock of the Dickey Oil Company (part of the marital property involved in the settlement agreement) for $6,260,000 plus $300,000 escrowed to cover income tax contingencies (Request No. 16 for Admissions, R. 64; Answer No. 16, R. 70). Information concerning such sale thereafter coming to Respondent's attention (R. 255), and realizing she had been defrauded and uninformed at the time of her property settlement, Respondent filed her instant action against Dickey in the District Court of Denver County, Colorado, on 18 September 1945 (R. 2). Dickey died on 20 February 1946, during the pendency of the action (R. 36), and Petitioners were appointed executors of Dickey's estate on 15 April 1946 and were substituted herein as parties defendant on 8 July 1946 (R. 41).

Respondent's instant action did not attack the Kansas divorce decree. Instead, it sought recovery of damages caused by the fradulently induced property settlement agreement—which agreement, as will hereinafter be demonstrated, was not adjudicated by and did not merge into the decree of divorce (e. g., see Colorado Supreme Court opinion, R. 430-433). Petitioners, however, asserted throughout that to award Respondent relief herein

would constitute a denial of full faith and credit, under Article IV of the federal constitution, to the Kansas judgment (e. g., R. 59-60). The trial court rejected this contention, found Dickey had been guilty of "extrinsic" fraud, and ordered Petitioners to place in trust a sum sufficient to pay Respondent $450.00 per month for life (R. 73-95).

Petitioners and Respondent both appealed from this decree to the Supreme Court of Colorado, Respondent specifying, *inter alia*, that the trial court erred in not awarding her an outright money judgment (Specification 5, R. 419) *and in granting her a grossly inadequate amount* (Specification 7, R. 419-420).

The Colorado Supreme Court, after carefully reviewing the pertinent Kansas decisions, determined that the Kansas divorce decree posed no bar to maintenance of an action such as Respondent's, either in Kansas or in Colorado (R. 428-434). It determined, further, that by Kansas law Dickey was, at the time of the property settlement negotiations, obligated fully and completely to disclose to Respondent the extent and value of the marital assets; also, that Kansas law raises a presumption of concealment and overreaching ("constructive fraud") when a property settlement agreement contains an inadequate allowance to the wife. (R. 437-439). Finally, the Colorado Supreme Court determined that there was an abundance of evidence to support the trial court's finding that Dickey was guilty of the "constructive" or "extrinsic" fraud of nondisclosure (R. 437, 439). Accordingly, it affirmed the decision of the trial court insofar, but only insofar, as it sustained Respondent's right to recover damages (R. 444). But it upheld Respondent's contention and reversed the decree below with respect to the relief awarded, remanding the cause with two directions: (1)

that the trial court consider and determine the amount of damages to which Respondent is entitled, and (2) that it then render judgment for that amount in a lump sum and not in trust:

> "The cause is remanded with directions to enter a money judgment for such sum as shall be determined by the court, from the evidence heard upon the trial, as will result in a fair and equitable division of property as required under Kansas law." (R. 444)

It is this decree, nonfinal upon its face, which Petitioners ask this Court to review upon certiorari.

D.

SUMMARY OF ARGUMENT

1. Respondent's right of recovery and the quantum of damages to which she is entitled are inseparable, component parts of her single cause of action. The decree of the Colorado Supreme Court has not finally terminated the litigation below because, although it adjudicates plaintiff's right of recovery, it remands the cause to the district court for judicial determination of Respondent's damages—no mere ministerial act. Manifestly, therefore, the decree is not "final" within Section 1257 of the Code. By the same token, certiorari may not issue.

2. Under Kansas law the settlement contract was absolutely binding upon the Kansas divorce court since neither litigant there pleaded or otherwise raised any issue as to its validity. It could not have disapproved, set aside, or modified the contract even had it so desired. Accordingly, by Kansas law the court's perfunctory approval thereof was no adjudication of its validity nor did it cause the agreement to become merged in the divorce decree. Again, no evidence was introduced before the

Kansas divorce court regarding the extent or value of the Dickeys' marital assets, so that court could not and did not judicially inquire into, determine, or adjudicate even the adequacy of the provision which the contract made for Respondent. Finally, whether Dickey was guilty of the constructive fraud of nondisclosure was neither raised in nor determined by the Kansas court. It follows that in permitting Respondent to maintain her instant action to recover damages for constructive fraud the Colorado court accorded to the Kansas divorce decree exactly the same credit it would have received had this suit been instituted in Kansas. The constitutional mandate of "full faith and credit" has not, therefore, been transgressed.

E.

ARGUMENT AND AUTHORITIES

I.

The Decree Below Is Not Final Since It Remands the Case to the District Court For Judicial Determination of Plaintiff's Damages.

Title 28, United States Code, Section 1257, invests this Court with jurisdiction to review, by appeal or certiorari, only:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had. . ."

To be "final", and, hence, reviewable by this Court, a decree must fully terminate the litigation, determine all rights of the parties, and leave nothing to be done except the ministerial act of entering judgment in accordance with the decree. For example, see *Gospel Army v. Los Angeles*, 331 U. S. 543, 546, 91 L. ed. 1662, 1665:

> "Under §237 of the Judicial Code, 28 USCA §344, 8 FCA Title 28, §344, only 'final judgments' of state courts may be appealed to this court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.' *Department of Banking v. Pink*, 317 US 264, 267, 62 L ed 123, 38 S Ct 7."

The decree below cannot satisfy this rudimentary test. It does not end the litigation or determine all of Respondent's rights and Petitioners' liability. Instead, it requires the trial court to exercise its judicial discretion of determining the amount of damages to which Respondent is entitled. Unarguably this is no "mere ministerial duty . . . to mathematically compute the amount to be paid the Respondent" as Petitioners blandly assert (Pet. for Cert. 49). The decree is *not* that Respondent be awarded outright the same amount of money which the Colorado trial court originally ordered to be placed in trust. On the contrary, the trial court is ordered:

> " . . . to enter a money judgment for such sum as shall be [not for such sum as has been been] determined by the court, from the evidence heard upon the trial, as will result in a fair and equitable division of property required under Kansas law." (R. 444)

In fine, the trial court is directed to reconsider the damage issue, to arrive at a judicial determination of a fair and equitable award to Respondent, and then, and only then, to enter judgment accordingly.

It is well settled that under these circumstances the decree below, which does not resolve the damage issue, is not "final": *Republic Natural Gas Co. v. Oklahoma,* 334 U. S. 62, 92 L. ed. 1212; *Catlin v. United States,* 324, U.S. 229, 233, 89 L. ed. 911, 916; *Lacelede Gas Light Co. v. Public Service Comm.*, 304 U. S. 398, 82 L. ed 1422; *Mississippi Central Railroad Co. v. Smith,* 295 U. S. 718, 79 L. ed. 167; *Bruce v. Tobin,* 245 U. S. 18, 62 L. ed. 123; *Washington ex rel. Grays H. L. Co. v. Superior Court,* 243 U. S. 251, 61 L. ed. 702; *Martinez v. International Banking Corp.,* 220 U. S. 214, 55 L. ed. 438; *California National Bank v. Stateler,* 171 U. S. 447, 43 L. ed. 233; *Drake v. Kochersperger,* 170 U. S. 303, 42 L. ed. 1046; *Union Mutual Life Ins. Co. v. Kirchoff,* 160 U. S. 374, 40 L. ed. 461; *Lodge v. Twell,* 135 U. S. 232, 34 L. ed. 153; *Grant v. Life Ins. Co.*, 106 U. S. 429, 27 L. ed. 237; *Follansbee v. Ballard Paving Co.,* 154 U. S. 651, 25 L. ed. 802; *Davis v. Crouch,* 94 U. S. 514, 24 L. ed. 281; *North Carolina R. Co. v. Swasey,* 90 U. S. 405, 23 L. ed. 136; *Montgomery v. Anderson,* 62 U. S. 386, 16 L. ed. 160.

Strikingly illustrative of this principle in *Mississippi Central Railroad Co. v. Smith, supra,* 295, U.S. 718, one of countless memorandum decisions by this Court applying the rule under consideration. There, Appellee brought suit against Appellant railroad in a Mississippi state court to recover damages sustained in a collision between his automobile and Appellant's train. Judgment was entered for Appellee upon a jury's verdict which awarded him $11,000. On appeal to the Mississippi Supreme Court the railroad contended certain instructions to the jury under the Mississippi "whistle and bell statute" violated the equal protection and due process clauses of the federal constitution. That court rejected the constitutional

contention and affirmed the judgment save as to amount. It ordered that judgment be entered for $7,000 if Appellee would accept a remittitur of $4,000; "otherwise, it will be reversed . . . and the cause remanded for trial on the question of the amount of damages only" (159 So. 562). An attempted appeal therefrom to this Court was dismissed upon the ground that the Mississippi Supreme Court decree was not "final" since it did not determine the damage feature of the case.

There is no merit to instant Petitioners' contention (Pet. for Cert. 49) that because the "constitutional question" has been adjudicated by the Colorado Supreme Court its decree is final notwithstanding the fact that the cause is remanded to the Colorado trial court for redetermination of the damage feature. Each of the authorities immediately hereinbefore cited constitutes a complete refutation of that position.

Thus, see *Bruce v. Tobin, supra*, 245 U. S. 18, a leading decision upon this very point, where an identical contention was repudiated in these words:

> "It may be indeed said that although the case was remanded by the court below for a new trial, the action of the court was in a sense final because it determined the ultimate right of the father to recover and the general principles by which that right was to be measured. But that contention is not open . . . " (p. 19)

To the same effect is this Court's recent, analogous opinion in *Republic Natural Gas Co. v. Oklahoma, supra*, 334 U.S. 62, 68:

> "Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to

be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages."

Finally, it is of no moment that the Colorado Supreme Court decree taxed the costs of the appeal to Petitioners (e. g., see *Davis v. Crouch, supra,* 94 U. S. 514). Were the rule otherwise nearly all state supreme court decrees —including, even, those disposing of appeals from mere interlocutory rulings upon motions and demurrers— would be final and reviewable inasmuch as appellate decrees invariably assess the costs of the appeal to the unsuccessful litigant.

Newton v. Consolidated Gas Co., 265 U. S. 78, 68 L. ed. 909 (1924), the single authority adduced by Petitioners for their novel contention (Pet. for Cert. 50), is patently irrelevant. There, Appellee gas company secured an injunction against enforcement of a New York statute fixing, at a confiscatory rate, the price at which the company might supply gas to its private customers. Thereafter a controversy arose in the district court with respect to costs. The district court assessed to Appellant the cost ($76,086.50) paid by Appellee gas company to a surety company for bonds to secure repayment of money impounded with a special master during the trial of the injunction suit. Appeal to this Court was perfected from, and only from, the final order taxing such costs to Appellant.

The primary issue posed by the *Newton case* was not whether a judgment assessing costs is final, but whether a final judgment assessing costs is appealable. And on the former issue the order was considered final not because it related to "costs", but because it terminated the litigation, leaving nothing further to be decided:

> "If the subject-matter is appealable at all, there would seem to be no doubt that the decree has all the characteristics of finality. An execution can issue at once to collect the costs as taxed, including the item here complained of." (265 U. S. at 82; 68 L. ed. at 910)

At all events assuredly this Court did not there hold that a decree, otherwise nonfinal, intermediary, or interlocutory, must nevertheless be held "final" merely because it includes an order taxing appellate costs to one of the litigants.

We submit that, beyond all doubt, the Colorado Supreme Court decree is not "final" and that the petition for certiorari must be dismissed.

II.

The Colorado Supreme Court Did Not Deny "Full Faith and Credit" to the Kansas Divorce Decree.

As hereinbefore pointed out, the issue of fraud (affirmative or constructive) in Dickey's procurement of the property settlement contract was not within the pleadings filed in the Kansas divorce suit, and no such issue was considered or adjudicated by the District Court of Sedgwick County, Kansas, in the divorce action (R. 9-17, 179-180; see Colorado Supreme Court opinion, R. 430, 433). Therefore, unless Respondent's rights with respect to the Dickey marital property were adjudicated by the divorce court so as to become merged in its decree, unquestionably that decree constitutes no bar to maintenance of the instant proceeding.

Yet under Kansas law a property settlement agreement effected by the parties to a divorce action is, unless it be attacked in such action by the parties themselves, bind-

ing and conclusive upon the divorce court which lacks jurisdiction to annul, modify, or disapprove the parties' own contractual division of property: *Petty v. Petty,* 147 Kan. 342, 76 P. (2d) 850; *Perkins v. Perkins,* 154 Kan. 73, 114 P. (2d) 804; see Colorado Supreme Court opinion, R. 430-433.

Necessarily, therefore, the Kansas divorce court's perfunctory "approval" of the instant settlement did not "adjudicate" the respective property rights of the parties or merge their contract into the decree of divorce—the court's nugatory approbation could not merge into its decree a private agreement it lacked power to reject, alter, or amend. *Per contra,* the parties by their contract withdrew the property division issue from the consideration of the divorce court and deprived it of all jurisdiction to adjudicate such issue. After the divorce decree, precisely as before, the property rights of the parties rested exclusively upon their own agreement: *Petty v. Petty, supra,* 147 Kan. 342, 76 P. (2d) 850; *id.,* 167 Kan. 510, 207 P. (2d) 428; *Hyde v. Hyde,* 143 Kan. 660, 56 P. (2d) 437; *id.,* 147 Kan. 134, 75 P. (2d) 1023; *Shaffer v. Shaffer,* 135 Kan. 35, 39, 10 P. (2d) 17; see Colorado Supreme Court opinion, R. 430-433. The inefficacy of the divorce court's "approval" of the settlement agreement becomes especially apparent when it is remembered that the court had before it no evidence regarding the extent or value of the Dickey's marital property (R. 10, 179-180; Colorado Supreme Court opinion, R. 424), and, therefore, could not possibly have determined whether or not the contract awarded an equitable division of such unknown property to Respondent. As Mr. Justice (later Chief Justice) Dawson wrote, in *Leslie v. Manufacturing Co.,* 102 Kan. 159, 162, 169 Pac. 193, of a comparable judicial "approval":

> "There was no judicial consideration of the matter at all in the city court—not even of the question whether the infant's interests were being protected by the agreement to which the city court was asked to give its judicial sanction. There was in fact no judgment in any proper sense, but merely a mumery of form in a vain endeavor to give some colorable judicial approval of the settlement."

While Petitioners point hopefully to an old (1931) Kansas decision in *Hullet v. Hullet*, 133 Kan. 738, 3 P. (2d) 470, rendered before the rule hereinbefore discussed had become crystallized in that state, and stress the fact that in the second *Petty v. Petty* decision (*supra*, 167 Kan. 510, 207 P. 2d 428) the *Hullet* opinion was paid the courtesy of sophistical distinction (instead of being unceremoniously overruled), the fact remains that the *Hullet* decision has never since been followed in Kansas and that the nonmerger rule laid down by the first *Petty* opinion (*supra*, 76 P. 2d 850) has been applied without exception by the Kansas courts and represents the law of Kansas.

Since, as the foregoing authorities establish, any action by Respondent to enforce her rights under the settlement contract must have been brought upon that agreement, not upon the divorce decree, it follows, conversely, that her instant action to avoid the unconscionable effects of that contract for fraud in its procurement is, perforce, an attack upon that agreement and not upon the judgment of divorce. Accordingly, the full faith and credit of that judgment was not involved in or denied by the Colorado decree. Squarely in point is *Schoonover v. Schoonover*, 172 F. (2d) 526 (C.C.A. 10).

In any event, it has already been demonstrated that by Kansas law Respondent's property rights did not merge

into the divorce decree. Inasmuch, therefore, as her present cause of action premised upon constructive fraud has never before been the subject of litigation in any court, the aforementioned want of merger is fatal to Petitioners' constitutional complaint—see *Magnolia Petroleum Company v. Hunt*, 320 U. S. 430, 439, 88 L. ed. 149:

> " . . . the clear purpose of the full faith and credit clause [is] to establish . . .that a cause of action merged in a judgment in one state is likewise merged in every other."

The mere fact, incidentally, that the Kansas divorce court chose to couple its ineffective "approval" of the settlement agreement with an "injunction" against violation of its terms cannot alter the determinative fact that Respondent's property rights are contractual, not decreed. The same want of jurisdiction to adjudicate the property rights as embraced in the agreement vitiates any attempt judicially to affect those private, contractual rights by injunctive pronounciamento. Completely irrelevant, too, is the doctrine (Pet. for Cert. 40-43) that litigants are estopped to attack decrees to which they have "consented". Respondent is not attacking the Kansas divorce decree; and the "consent decree" authorities could possess pertinency here only upon the erroneous assumption that by Kansas law Respondent's property rights became merged in the divorce decree and that her only remedy was to ignore the extinguished agreement and solicit vacation of the judgment. (It is, moreover, fundamental that a litigant may attack a consent decree if his consent was fraudulently obtained. In none of Petitioners' cited authorities did the unsuccessful litigant seek to impeach his "consent" on the ground of fraudulent procurement.)

In closing, it should be noted that Petitioners' basic error stems from the fallacious assumption that Respondent by her instant complaint asked the District Court of Denver County, Colorado, to redetermine the same issue —adequacy of the property division—already considered and adjudicated by the District Court of Sedgwick County, Kansas, and that the Colorado decision is essentially a finding that the Kansas court reached an incorrect conclusion (e. g., Pet. for Cert. 26, 32, 47-48). But we have hereinbefore demonstrated that the Kansas court had no jurisdiction to and did not adjudicate this issue; nor was it furnished with any evidence from which it might have drawn a conclusion as to the fairness of the property settlement.

Also, we are compelled to take issue with Petitioners' assertion that the Colorado district court held merely "that it is fraud in law for a man of the wealth of Mr. Dickey to give his wife the sum which she did receive under the property settlement" (Pet. for Cert. 16), and that the Colorado Supreme Court simply affirmed this theory of recovery (Pet. for Cert. 16, 30, 43-46, 46-48)— which, Petitioners suggest, is to convict Dickey of an anomalous type of fraud unknown to law.

Even a cursory examination of the Colorado Supreme Court opinion (R. 436-439) will reveal, however, that the court, after studiously examining the Kansas decisions, held Dickey guilty of the constructive (or "extrinsic") fraud of failing to perform his bounden duty of disclosing fully and completely the extent and value of the marital assets which the contract purports to divide.

By Kansas law assets accumulated during the marital relationship are, in divorce actions, treated as a species

of community property in which the wife has an inviolable interest: *Cummings v. Cummings*, 138 Kan. 359, 361, 26 P. (2d) 440; *Putnam v. Putnam*, 102 Kan. 47, 52-54, 177 Pac. 838; *Tobin v. Tobin*, 89 Okla. 12, 213 Pac. 884, 888-889. This rule is embodied in a statute (G. S. Kan. 1947 Supp., 60-1511, quoted in the Colorado Supreme Court opinion, R. 428-429) which requires that the wife be awarded "a fair and just division" of all such marital property—regardless, even, of her fault: *Holder v. Holder*, 143 Kan. 79, 53 P. (2d) 806; *Davison v. Davison*, 125 Kan. 807, 266 Pac. 650; *Leach v. Leach*, 46 Kan. 724, 27 Pac. 131.

A concomitant rule requires a husband, in negotiating a property settlement with his wife, to exercise the utmost good faith and to inform her fully and completely concerning the extent and value of the marital estate; and if the contractual provision made for the wife is disproportionate to the means of the husband, the Kansas law raises a presumption of fraudulent concealment and casts upon him the burden of proving affirmatively that he made the complete disclosure demanded of him by law or of suffering the vitiating consequences of "constructive fraud": *Watson v. Watson*, 104 Kan. 578, 180 Pac. 242, 244; *Cessna v. Cessna*, 155 Kan. 856, 130 P. (2d) 560, 563; *Shaffer v. Shafer*, 135 Kan. 35, 10 P. (2d) 17; *Pattison v. Pattison*, 129 Kan. 558, 283 Pac. 483; *Hoard v. James*, 119 Kan. 138, 237 Pac. 888. See, also, *Mann v. Mann*, 135 Okla. 211, 275 Pac. 348, 351. (The Oklahoma divorce statute—12 Okla. Stats. Ann. §1278, p. 179—is copied *verbatim* from G. S. Kan. 1947 Supp., 60-1511, *supra*, and Oklahoma and Kansas decisions construing and applying this mutual property division statute are interchangeably authoritative in both states, as was con-

ceded by Petitioners at page 62 of their original brief to the Colorado Supreme Court.)

Under Kansas law the award to Respondent of merely $250,000 out of marital property then worth between five and six million dollars (R. 79) was grossly inadequate and disproportionate as an inexorable matter of law: *Holder v. Holder*, 143 Kan. 79, 53 P. (2d) 806; *Mann v. Mann*. 136 Kan. 331, 15 P. (2d) 478. Hence, the aforementioned presumption of constructive fraud became operative in the case at bar; and, since Petitioners failed to demonstrate that Dickey made the requisite "full and complete disclosure", Dickey stands convicted by the instant record of constructive fraud. Furthermore, in our "Statement of the Case" we have hereinbefore demonstrated there was abundant affirmative proof of the fact that Dickey failed to make the full disclosure indispensable to defend the settlement contract against Respondent's attack.

The foregoing are the precise rules of Kansas law upon which the Colorado Supreme Court relied in concluding that Dickey was guilty of constructive fraud (R. 428-429, 436-437, 437-439), and its decision upon this issue is not only supported but compelled by the Kansas authorities.

Many additional arguments might be advanced to rebut Petitioners' assertion that the decision of the Colorado Supreme Court withheld from the Kansas divorce decree the faith and credit to which it was constitutionally entitled. (Respondent's briefs to the Colorado District Court alone consumed 162 pages, most of them devoted to this one point—R. 79.) In view, however, of the manifest infinality of the decree below we refrain from pursuing the issue further.

F.

CONCLUSION

It is submitted the decree of the Colorado Supreme Court is not "final" within the requirement of Section 1257 of the Code, and that, in any event, it is not violative of the full faith and credit mandate of the federal constitution. For either or both of these reasons it is submitted the petition for writ of certiorari should be denied.

GEORGE SIEFKIN,
JOHN F. EBERHARDT,
Of Wichita, Kansas,

MAX MELVILLE,
Of Denver, Colorado,

Counsel for Respondent.